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No. 12777

2672

United States
Court of Appeals
for the Ninth Circuit.

FENWAL, INCORPORATED, a Corporation,
Appellant,
vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a Partnership,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

APR 11 1951



No. 12777

**United States
Court of Appeals**
for the Ninth Circuit.


FENWAL, INCORPORATED, a Corporation,
Appellant,

vs.

**W. RAY MONTGOMERY, FREDERICK H.
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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plainants, Cross-Appellants and Appellees.

District Court of the United States, for the North-
ern District of California, Southern Division
Civil Action No. 28851R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a Partnership,
Defendants,

COMPLAINT FOR BREACH OF CONTRACT

Comes now the plaintiff above named and for a
cause of action against said defendants alleges:

1. Plaintiff is a corporation, duly organized and
existing under the laws of the Commonwealth of
Massachusetts, and duly authorized and qualified
to do business in the State of California. Defend-
ants W. Ray Montgomery and Frederick H. Mont-
gomery are co-partners doing business as a part-
nership under the laws of the State of California,
under the firm name of Montgomery Brothers. De-
fendants are and each of them is a citizen of the
State of California. The matter in controversy ex-
ceeds, exclusive of interest and costs, the sum of
three thousand dollars.

2. On May 26, 1944, plaintiff and defendants,
for a valuable consideration, entered into a contract
in writing, a copy of which is attached hereto as
Exhibit A. Said contract was later amended by a
written agreement dated October 11, 1946, a copy
of which is attached hereto as Exhibit B.

3. Pursuant to paragraph 8 of the said contract, plaintiff terminated this contract by a letter dated December 29, 1948, a copy of which is attached hereto as Exhibit C, which termination became effective at the close of business on February 28, 1949.

4. Plaintiff has duly performed and observed all the provisions and conditions of such contract on its part to be performed and observed.

5. Defendants are indebted to plaintiff in the sum of \$47,333.69 under said contract, for goods sold and delivered by plaintiff to defendants from January 1, 1949, through February 23, 1949, on orders placed by the defendants with plaintiff, pursuant to said contract. Defendants have failed and refused to pay said sum or any part thereof although plaintiff has demanded payment thereof.

6. By reason of the foregoing facts, plaintiff has been damaged in the sum of \$47,333.69.

Wherefore, plaintiff demands judgment against defendants in the sum of forty-seven thousand three hundred thirty-three and sixty-nine hundredths Dollars (\$47,333.69), with interest thereon from February 23, 1949, and the costs of this action.

/s/ BURNHAM ENERSEN,

/s/ FELIX F. STUMPF,

McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS &
GREENE,

Attorneys for Plaintiff.

EXHIBIT A

This Is an Agreement dated May 26, 1944, between Fenwal Incorporated, a Massachusetts corporation with its principal place of business at Ashland, Massachusetts, hereinafter called Fenwal, and Montgomery Brothers, a partnership with its usual place of business at San Francisco, California, hereinafter called Montgomery.

Witnesseth: That

Whereas Fenwal produces Fenwal Thermo-switches, hereinafter referred to as switches, and Montgomery desires to be appointed exclusive representative for the sale of the switches in the territory described below.

Now Therefore, in consideration of the promises herein contained and other consideration paid by each party to the other, receipt of which is hereby acknowledged, it is agreed:

1. Fenwal hereby appoints Montgomery its exclusive representative for the sale of switches in the following states and territories, which are collectively referred to in this agreement as the territory:

Washington, Oregon, Idaho, Western Montana, Nevada, Utah, Arizona, California, Hawaii, and Alaska.

2. Montgomery will sell switches only to customers located in the territory and only at Fenwal's list prices and established discounts plus transportation charges from Ashland, Massachusetts, which charges shall not exceed ten (10) per cent of Fen-

wal's net prices. It is agreed that no device or arrangement is to be entered into by Montgomery with any customer which will in any way result in sales below Fenwal's list prices plus transportation charges as provided for in this agreement.

3. Montgomery will use its best efforts to obtain orders for switches and agrees to pay its traveling and other expenses. Montgomery agrees that it will not incur any expenses on behalf of Fenwal or make any representations or agreements which shall bind or purport to bind Fenwal.

4. Montgomery will purchase from Fenwal and at all times carry in stock reasonable quantities of the various types of switches produced by Fenwal in order to be in a position to make prompt shipment of the same to Montgomery's customers.

5. Fenwal will sell switches to Montgomery at the following prices:

A. Either at a discount from Fenwal's list prices of 50% and 10%; or

B. At Fenwal's list prices less Fenwal's usual representative's commissions, provided that the commissions to be allowed Montgomery shall not be less than 10% of Fenwal's net F.O.B. prices at Ashland, Massachusetts. The fixing of the commission at not less than 10% is necessary to compensate Montgomery for the expense of billing customers and for assuming all credit risks.

Unless Fenwal is otherwise notified by Montgomery, all items sold under this agreement shall be priced as stated in subparagraph A of this paragraph.

6. All orders and inquiries received by Fenwal from customers in the territory shall be promptly referred to Montgomery.

7. Nothing in this agreement shall be construed as creating an employer-employee relationship between Fenwal and Montgomery or any other relationship between them except that of seller and buyer.

8. This agreement shall continue in force until terminated by either party, but may be terminated by either party upon sixty days' written notice given by the ordinary mail to the last known address of the other party. At the termination of this contract, Montgomery agrees to return to Fenwal all samples, papers, price lists or belongings of Fenwal which may be in the possession of Montgomery at the time and an active list of purchasers of switches.

9. This contract was made and executed in the State of Massachusetts and is to be construed and interpreted under the laws of that State.

10. The decision of Fenwal on any questions as to the origin of sales or the disposition of commissions shall be conclusive and final.

In Witness Whereof the parties have caused this

agreement to be executed by their duly authorized representatives.

FENWAL INCORPORATED,

By W. J. TURENNE,
Vice-President.

MONTGOMERY BROTHERS,

By F. H. MONTGOMERY.

May 1, 1944

Mr. Fred Montgomery,
Montgomery Brothers,
61 Fremont Street,
San Francisco, California

Dear Fred:

While your brother Ray was here in Ashland, we submitted to him two copies of a new contract which is to supersede our Sales Contract with you dated March 2, 1942. It is quite probable that he has mailed the copies of the new contract to you.

This new contract does not expressly deal with special products which you or we, or both of us working together, may develop to meet the special requirements of your customers.

This will confirm our understanding that as to such products the discount we are to give you from the price to your customers will be fixed by agreement between us. In the event that we fail to agree on a commission, Fenwal's decision shall be accepted as final. The discount is to compensate you

fairly for your selling work, for any engineering or similar work done by you and for taking the credit risk. The rate of discount will vary depending on any of several factors such as the amount of engineering work done by either of us and depending on the size of the orders for the special product involved.

You may wish to attach this letter to the copies of the new contract.

With kind regards,

FENWAL INCORPORATED,

/s/ W. J. TURENNE,

Vice-President and Manager.

EXHIBIT B

This Is an Agreement, dated October 11, 1946, between Fenwal Incorporated and Montgomery Brothers amending and supplementing their agreement dated May 26, 1944, and incorporating the agreements which have been made by the parties orally or by letters since May 26, 1944, and this agreement therefore states the entire agreement between the parties.

For consideration received by each party from the other, it is agreed:

1. Sub-paragraph A of paragraph 5 of the agreement of May 26, 1944, is amended by changing the figure "10%," which appears once in sub-paragraph A, to "15%."

2. Sub-paragraph B of paragraph 5 of the agreement of May 26, 1944, is amended by changing the figure "10%," which appears twice in sub-paragraph B, to "15%."

3. The commission or discount to be allowed by Fenwal Incorporated to Montgomery Brothers on sales of Unit Fire Detectors made in Montgomery Brothers' territory is to be 15% instead of 20% as previously agreed by letter.

4. On the sale of any special Thermoswitches or other special items which do not appear in Fenwal's catalog, Fenwal Incorporated is to allow Montgomery Brothers a commission or discount of 20% of the net price to customers in Montgomery Brothers' territory only.

If and when any special Thermoswitch or special item is made a standard Fenwal catalog item by Fenwal Incorporated, the commission or discount shall thereafter be as provided in paragraph 5 of the original agreement, dated May 26, 1944, and as amended by paragraphs 1 and 2 above.

In Witness Whereof, the parties have caused this agreement to be executed by their duly authorized representatives.

FENWAL INCORPORATED,
By J. M. STORKERSON.

MONTGOMERY BROTHERS,
By F. H. MONTGOMERY.

EXHIBIT C

Air Mail

Registered—Return Receipt Requested

December 29, 1948

Montgomery Brothers
1122 Howard Street
San Francisco, California

Gentlemen:

This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty (60) days after the receipt by you of this letter.

We believe that it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone, but we shall be glad to confer with you about this if you feel that it is desirable that we do so.

Very truly yours,

FENWAL INCORPORATED,

C. W. WALTER,
President.

CWW:MM

[Endorsed]: Filed May 14, 1949.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 28851-R

FENWAL, INCORPORATED,

Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY, and MONTGOMERY
BROTHERS, a Partnership,

Defendants.

W. RAY MONTGOMERY and FREDERICK H.
MONTGOMERY, Doing Business Under the
Firm Name and Style of MONTGOMERY
BROTHERS,

Cross-Complainants,

vs.

FENWAL, INCORPORATED,

Cross-Defendant.

ANSWER AND CROSS-COMPLAINT

Come now the defendants above named, and answering plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

Deny that the plaintiff and defendants, for a valuable consideration, entered into a contract in writing, a copy of which is attached to plaintiff's complaint and marked Exhibit "A"; and in this

respect defendants allege that on or about May 1, 1944, and May 26, 1944, plaintiff and defendants, for a valuable consideration, entered into a contract in writing, a copy of which is attached hereto and marked Exhibit "A"; that said contract was amended by written agreement dated October 11, 1946, a copy of which is attached hereto and marked Exhibit "B."

II.

Defendants admit the allegations of paragraph III of plaintiff's complaint, and in this respect allege that the said termination referred to in the letter of December 29, 1948, which was to have become effective as of the close of business on February 28, 1949, was by mutual agreement of the parties thereto set aside and after February 28, 1949, it was of no force and effect, and that said parties continued to perform under and by virtue of the contracts herein referred to as having been made and entered into on May 1, 1944, and May 26, 1944, and amended October 11, 1946.

III.

Defendants deny that the plaintiff has fully performed and/or observed all of the provisions and/or conditions of such contracts on its part to be performed and/or observed.

IV.

Defendants deny that they are indebted to the plaintiff in the sum of \$47,333.69 under said contract for goods sold and/or delivered by plaintiff to defendants from January 1, 1949, through Feb-

ruary 23, 1949, and in this respect allege that they have withheld payment for goods sold and/or delivered in the sum of \$46,422.89, and further allege that the plaintiff is indebted to the defendants by way of offset in the sum of \$38,103.18, being the amount of profit that the defendants would have made had the plaintiff filled all orders lodged by the defendants with the plaintiff up to and including February 28, 1949, and for the period between February 28, 1949, and May 18, 1949.

That in the performance of the terms and provisions of said contract it was the practice of the parties for the defendants to lodge with the plaintiff certain specified orders, giving the names and addresses of the purchasers, the articles to be shipped to the purchasers, and that thereafter the plaintiff would bill the defendants for the price of the commodity as referred to in said contract, and then the defendants would make, as their profit, the difference between the price charged the purchaser and the price due the plaintiff at the rates established by the said contract. That the plaintiff failed, neglected and refused to fill sales orders lodged with it by defendants, and that the defendants were thereby deprived of a profit in the said sum of \$38,103.18.

V.

That on or about the 9th day of March, 1949, the defendants assigned to the plaintiff all of the unfilled orders which they had lodged with the plaintiff, which had not up to that time been filled, without prejudice to the rights of the defendants

to any and all profits that they would have made had said orders been filled directly by said plaintiff prior to the alleged termination date.

Further Answering Said Complaint, and by Way of Cross-Complaint, Cross-Complainants Complain of Cross-Defendant and for Cause of Action Allege:

I.

That at all times herein mentioned W. Ray Montgomery and Frederick H. Montgomery were, and now are, citizens of the State of California, and were and now are partners doing business under the name and style of Montgomery Brothers in the State of California; that the cross-defendant is a corporation duly organized under the laws of the State of Massachusetts and duly authorized and qualified to do business in the State of California. That the matter in controversy exceeds, exclusive of interest, the sum of \$3,000.00.

II.

That on or about the 1st day of May, 1944, and the 26th day of May, 1944, cross-complainants and cross-defendant, for a valuable consideration, entered into a contract in writing, a copy of which is attached hereto and marked Exhibit "A"; that said contract was amended by written agreement dated October 11, 1946, a copy of which is attached hereto and marked Exhibit "B."

III.

That in the performance of said contract, wherein

cross-complainants became the representatives of cross-defendant, it was the practice for the cross-complainants to lodge with the cross-defendant the names and addresses of purchasers, the commodity and delivery date thereof, and that thereafter the cross-defendant would send the said commodity directly to the purchaser, billing the same to the cross-complainants at the prices established under and by the terms of the contracts herein referred to as Exhibit "A" and Exhibit "B," and that the cross-complainants would bill the purchasers at the purchase price which had been agreed upon by and between the cross-complainants and the purchasers, and cross-complainants would receive as their profit the difference between the price for which the commodity was billed by the cross-defendant to the cross-complainants and the price charged by the cross-complainants to the purchasers.

That prior to February 28, 1949, the cross-complainants lodged sales orders with the cross-defendant under and pursuant to the terms of said Exhibits "A" and "B," at a purchase price of \$166,192.75, and that the cross-complainants had sold said commodities to their purchasers for the sum of \$202,548.47, making a profit to the cross-complainants in the sum of \$38,103.18.

That the cross-defendant had not filled said orders prior to February 28, 1949, resulting in damages to the cross-complainants in the sum of \$38,103.18.

IV.

That on or about the 9th day of March, 1949, the

cross-complainants assigned to the cross-defendant any and all unfilled orders with their purchasers, without constituting a waiver of any of the rights of cross-complainants against cross-defendant arising out of the contracts herein referred to as Exhibits "A" and "B."

V.

That by reason of the foregoing, cross-complainants have been damaged in the sum of \$38,103.18.

Further Answering Said Complaint and as a Second Ground of Cross-Complaint, Cross-Complainants Complain of Cross-Defendant and for Cause of Action Allege:

I.

Cross-complainants incorporate herein paragraph I of their first ground of cross-complaint and make the same a part hereof as though fully set out at length herein.

II.

That cross-complainants have, for thirty years last past, engaged in the business of representing manufacturers, and during said period of time have created an organization for the carrying on of said business in various cities in the United States. That one of their principal places of business is located in the City of Los Angeles, County of Los Angeles, State of California. That in the year 1939 they employed as a junior salesman one Edgar V. Hawkins at a salary of \$135.00 per month, and that since said time, by reason of training given the said

Hawkins by cross-complainants and by reason of various articles of merchandise handled by cross-complainants, the said Edgar V. Hawkins became the manager of said Los Angeles office of said cross-complainants, and that during the year 1948, the compensation paid said Edgar V. Hawkins as office manager of said Los Angeles office was in excess of \$10,000.00.

III.

That prior to the 29th day of December, 1948, the cross-defendant, anticipating the writing of the letter of December 29, 1948, and realizing the ability, knowledge, training and experience of the said Edgar V. Hawkins as said manager of cross-complainants at their Los Angeles office, and the fact that the said Hawkins knew the contents of and had access to all of the books, records and files of the customers of cross-complainants, and had for many years prior thereto been in communication with the customers in said area, and realizing that his services would be beneficial to the cross-defendant after the termination date set forth in said letter of December 29, 1948, to wit, February 28, 1949, in the selling of articles manufactured by cross-defendant, which said articles are referred to in the contracts hereunto attached and marked Exhibits "A" and "B," knowingly, wrongfully and maliciously enticed the said Edgar V. Hawkins and prevailed upon the said Hawkins to resign his position as office manager of said cross-complainants and to resign from his said employment with cross-complainants, and accept and take employment with

the cross-defendant, who at said time had established an office and place of business at 111 South Burlington Avenue, in the City of Los Angeles, County of Los Angeles, State of California, and did employ, and does now continue to employ the said Edgar V. Hawkins as manager of the Los Angeles branch office of the cross-defendant.

That the cross-defendant has advised customers of the cross-complainants in and about the Los Angeles area of the appointment of said Edgar V. Hawkins as manager of the Los Angeles branch office of the cross-defendant, and has capitalized the ability, knowledge and training of the said Edgar V. Hawkins for the purpose of taking from the cross-complainants many of their Los Angeles customers and their trade.

IV.

That by reason of the foregoing acts and activities of the cross-defendant, the cross-complainants and said cross-complainants' business have been damaged in the sum of \$50,000.00 actual damages and the sum of \$25,000.00 exemplary damages.

Wherefore, defendants and cross-complainants pray that plaintiff take nothing by its complaint on file herein, and that they have judgment against cross-defendant in the sum of \$113,103.18.

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants and
Cross-Complainants.

State of California,
City and County of San Francisco—ss.

Frederick H. Montgomery, being first duly sworn,
deposes and says:

That he is one of the defendants and cross-complainants in the above-entitled action; that he has read the foregoing Answer and Cross-Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ FREDERICK H.
MONTGOMERY.

Subscribed and sworn to before me this 15th day
of August, 1949.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBITS A AND B

[Exhibits A and B attached to the foregoing Answer and Cross-Complaint are identical to Exhibits A and B attached to the Complaint for Breach of Contract. See pages 5 to 9 of this printed record.]

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 15, 1949.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Comes now the Cross-Defendant above named and answering the cross-complaint herein, denies, admits and alleges as follows:

Answer to the First Cause of Action of Cross-Complaint

I.

Admits the allegations of paragraph I of said cause of action.

II.

Admits the allegations of paragraph II of said cause of action.

III.

Denies each and every, all and singular, the allegations of paragraphs III, IV and V of said cause of action.

As a First, Further, Separate and Distinct Answer and Defense to Said First Cause of Action, Cross-Defendant Alleges:

That the sum of \$30,359.53 was due and payable on February 10, 1949, by cross-complainants to cross-defendant for goods sold and delivered by cross-defendant to cross-complainants through January 31, 1949; that cross-complainants failed to pay said sum on said date; that such failure to pay on the part of the cross-complainants was a default under said contract; that the said default has not

been cured and that the said sum is still due and unpaid by cross-complainants; and that cross-complainants' default relieved cross-defendant from any, all and each obligation on its part to be observed and performed under said contract.

Answer to Second Cause of Action of
Cross-Complaint

I.

Answering the allegations of paragraph I of said cause of action, incorporates by reference as though here set out in full the contents of paragraph I of the Answer to cross-complainants' first cause of action.

II.

Denies each and every, all and singular, the allegations of paragraph II of said cause of action.

III.

Answering the allegations of paragraph III of said cause of action, admits that Edgar V. Hawkins accepted employment with the cross-defendant after resigning from his employment with cross-complainants, and that the said Edgar V. Hawkins is now employed by the cross-defendant; denies each and every, all and singular, the remaining allegations of said paragraph III.

IV.

Denies each and every, all and singular, the allegations of paragraph IV of said cause of action.

Wherefore, cross-defendant prays cross-complainants take nothing by their cross-complaint, and each

cause of action thereof be dismissed with prejudice; that it be awarded its costs of suit herein incurred; and that it receive such other and further relief as may be just and proper.

/s/ FELIX F. STUMPF,

McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS
& GREENE,
Attorneys for Plaintiff and
Cross-Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 20, 1949.

[Title of District Court and Cause.]

REQUEST FOR INTERROGATORIES
DIRECTED TO J. M. STORKERSON

To: McCutchen, Thomas, Matthew, Griffiths & Greene, and Felix F. Stumpf, Esq., Attorneys for Plaintiff and Cross-Defendant Fenwal Incorporated, a Corporation:

Pursuant to the provisions of law, Rule 33 of the Federal Rules of Civil Procedure, the defendants herein address to the plaintiff Fenwal, Incorporated, the following interrogatories to be answered separately, fully and under oath by J. M. Storkerson, General Manager of Fenwal, Incorporated:

1. What is your official position of employment with the plaintiff Fenwal, Incorporated?

2. Were you the general manager of said Fenwal, Incorporated, in the months of December, 1948, January, February, March, April and May, 1949?

3. Did you have a conversation with Frederick H. Montgomery and W. Ray Montgomery at the offices of Montgomery Brothers, 1122 Howard Street, San Francisco, California, on or about January 24, 1949?

4. Prior to January 24, 1949, and, to wit, on January 11, 1949, did you send the following telegram?

“January 11, 1949

“Montgomery Bros.

“Attn: F. H. Montgomery

“1122 Howard Street

“San Francisco, Calif.

“Would like to have discussion with you in San Francisco January 24th if this is agreeable.

“FENWAL INC.,

“J. M. STORKERSON.”

5. On January 12, 1949, did you receive from Montgomery Brothers the following telegram:

“January 12, 1949

“Mr. J. M. Storkerson

“Fenwal Incorporated

“Ashland, Massachusetts

“Retel will be glad to see you January 24 in San Francisco. Regards.

“MONTGOMERY BROTHERS,

“F. H. MONTGOMERY.”

6. Was there anyone else present besides yourself, Frederick H. Montgomery and W. Ray Montgomery at the conference held on or about January 24, 1949, at the office of Montgomery Brothers in San Francisco?

7. What is your best recollection as to what was said by each of the persons present at said conference?

8. Did you after said conference leave San Francisco and go to Los Angeles?

9. In Los Angeles did you have a conference or conferences with W. Ray Montgomery?

10. Where were these conferences held and who was present?

11. In the said conference which was held during the latter part of January, 1949, was anything said by either Frederick H. Montgomery or W. Ray Montgomery to you regarding the fact that Edgar V. Hawkins had left their employ?

12. If your answer to the foregoing interrogatory is yes, what was said by each of the persons at said conference?

13. Did you on that day hand to Montgomery Brothers a letter dated January 20, 1949, on the letterhead of Fenwal, Incorporated, signed by C. W. Walter, President?

14. If your answer to the foregoing interrogatory is yes, what was said by each of the persons present at said conference, regarding the contents or any part of the contents of said letter?

15. Do you recall anything specifically that was said by any party present at said conference with reference to the following language in said letter:

“We see no reason why you should be surprised by our action as we have repeatedly brought to your attention the fact that we have not been satisfied with your representation of us in the territory covered by our agreement.”

16. Will you state how or in what manner it was repeatedly brought to the attention of Montgomery Brothers that Fenwal, Incorporated, had not been satisfied with their representation of Fenwal, Incorporated, in the territory covered by the agreement?

17. Did you have a conversation with W. Ray Montgomery at the factory of Fenwal, Incorporated, at Ashland, Massachusetts, in the latter part of September or early part of October, 1948?

18. If your answer to the foregoing interrogatory is yes, who was present at the time, and what to your best recollection was said by each of the persons who participated in said conversation?

19. Prior to December 31, 1948, did you have a conversation or conversations with Edgar V. Hawkins pertaining to his becoming an employee of Fenwal, Incorporated, for the territory in and about Los Angeles, California?

20. If your answer to the foregoing interrogatory is yes, who was present at the conversation and what was said by all parties present at said conversation?

21. When for the first time did you first discuss with Edgar V. Hawkins, his employment as an employee of Fenwal, Incorporated?

22. If you did have such a conversation with Edgar V. Hawkins, where was said conversation held, who was present and what was said by all parties thereto?

23. Who was the person who negotiated the lease for the premises now occupied by Fenwal, Incorporated, in the City of Los Angeles, California?

24. When were the negotiations commenced for the leasing of said premises for Fenwal, Incorporated?

25. Did you at any time, orally or by letter, notify or inform Montgomery Brothers that you had employed Edgar V. Hawkins to represent Fenwal, Incorporated, or to work for Fenwal, Incorporated, in the Los Angeles area?

26. If your answer to the foregoing interrogatory is yes, state in full when and how said information was given to Montgomery Brothers.

27. Did you in the conversation held at San Francisco, during the latter part of January, 1949, discuss the personnel of Fenwal, Incorporated, in Los Angeles area with regard to the number of employees and number of engineers to be employed in conducting said office?

28. In said conversation held in the latter part of January, 1949, what if anything was said by any

of the parties present as to a settlement with reference to an adjustment of profits coming to Montgomery Brothers on unfilled orders?

29. Were the terms of the letter of January 20, 1949, herein above referred to and particularly pertaining to the fourth paragraph thereof, reading as follows:

“We note that you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of the release schedules and dates of shipments, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. We expect to fill orders which have been accepted by us or may later be accepted by us, provided you carry out your part of the contract. It seems likely that the filling of those orders will involve an adjustment of the discount or commission allowed to you, but we shall not try to discuss details in this letter,”

discussed by the parties at said conversation held January 24, 1949?

30. If your answer to the foregoing interrogatory is yes, what was said by all parties present pertaining thereto?

31. In the foregoing conversation do you recall anything having been said with reference to Montgomery Brothers retaining 50% of the profits on

orders assigned pertaining to the aircraft industry, up to the end of February, 1949, provided that Montgomery Brothers retained the representation of Fenwal, Incorporated, in the balance of the area which they served prior to the termination of the contract?

32. If your answer to the foregoing interrogatory is yes, state what was said by all persons present pertaining thereto.

33. Have you given us all that you recollect occurred at the conference held in San Francisco during the latter part of January, 1949?

33a. At the said conversation did you state in substance that you would go back to Fenwal's factory and endeavor to sell them the ideas which were set forth by Montgomery Brothers at that time?

34. At the termination of this conversation did you make arrangements to meet W. Ray Montgomery at Los Angeles at some early date thereafter?

35. Following the conference hereinabove referred, did you go back to Los Angeles? If so, what date did you leave and when did you arrive in Los Angeles?

36. Did you meet W. Ray Montgomery in Los Angeles at the offices of Montgomery Brothers, 849 E. 8th Street, Los Angeles, during the latter part of January, 1949?

37. What is your best recollection as to the date this conversation was held?

38. Who was present at this conversation?

39. What was said by each of the persons present at that conversation?

40. Did you on the afternoon of January 27, 1949, go with W. Ray Montgomery and Frederick H. Montgomery to the Douglas Aircraft Company?

41. If your answer to the foregoing interrogatory is yes, did you have a conversation at Douglas Aircraft Company and who was present at this conversation. What was said by the parties present?

42. In this conversation was Mr. Edgar V. Hawkins introduced to Mr. Dorn of Douglas Aircraft Company as the person who would be the manager or representative of Fenwal, Incorporated, in the Los Angeles area?

43. Did you thereafter and while in Los Angeles, together with Edgar V. Hawkins and W. Ray Montgomery call on the North American Aircraft and Lockheed Aircraft companies?

44. If your answer to the foregoing interrogatory is yes, what to the best of your recollection, was the date of these conferences, and who were the persons present, and what was said at that time?

45. Do you recall that at one of these conversations a Mr. McChesney commented on the fact that Mr. Hawkins had been taken from Montgomery Brothers by your firm?

46. If you answer to the foregoing interrogatory is yes, what was said by Mr. McChesney?

47. After your visits to the aircraft companies on the twenty-seventh and twenty-eighth of January, 1949, did you thereafter and on the following Sunday morning, have a conference or conversation with W. Ray Montgomery and Edgar V. Hawkins, first at the Biltmore Hotel and then at the Savoy Hotel in Los Angeles?

48. If your answer to the foregoing interrogatory is yes, what was said by all the persons present at said conference or said conversations?

49. What, if anything, was said in this conversation, with reference to the continued handling of the Boeing account at Seattle by Montgomery Brothers?

50. Did you in the last referred to conversation state in substance that you had telephoned and discussed the matter with your company and that it was still open and upon your return to the offices of your company you would communicate with Montgomery Brothers pertaining to an adjustment of the entire matter?

51. Did you in this last referred to conversation state in substance to W. Ray Montgomery and Frederick H. Montgomery that Fenwal, Incorporated, had employed Edgar V. Hawkins, either as a manager for the Los Angeles area, or a representative, of Fenwal, Incorporated?

52. Had you prior to this conversation advised either W. Ray Montgomery and Frederick H. Montgomery that Edgar V. Hawkins was to be the Los Angeles manager for Fenwal, Incorporated?

53. Have you in your possession any letter or letters, or communications in writing, from Montgomery Brothers, which in substance provide that the payments to be made by Montgomery Brothers to Fenwal, Incorporated, are to be made on or before the tenth day of each succeeding month?

54. If your answer to the foregoing interrogatory is yes, kindly attach copy or copies of said communications to your reply to these interrogatories.

55. Have you a copy of the financial statement of Fenwal, Incorporated, for any of the following months: December, 1948; January, February, 1949?

56. If your answer to the foregoing interrogatory is yes, kindly attach a copy thereof to your reply to these interrogatories; if your answer is no, kindly attach the last financial statement prior to said time.

57. Were you in the City of Los Angeles, California, on or about March 9 or 10, 1949?

58. Did you see W. Ray Montgomery in Los Angeles at that time?

59. If your answer to the last interrogatory is yes, when and where, and who was present and what was said by the persons present at the time

any conversation was held?

60. Was Mr. Robinson present at these conversations?

61. If your answer to the foregoing interrogatory is yes, was Mr. Robinson at any time connected with Fenwal, Incorporated? If so, in what capacity?

62. Did you at this conversation advise W. Ray Montgomery why you came to Los Angeles?

63. What, if anything, was said in these conversations with reference to an assignment of certain orders that Montgomery Brothers had with Fenwal, Incorporated?

64. On how many occasions did you see W. Ray Montgomery in the month of March, 1949, in Los Angeles?

65. Where did you see him and did you have conversations with him? Who was present and what was said?

66. In these conversations was anything said about assignments? If so, what was said?

67. Did you call on the aircraft companies with W. Ray Montgomery? If so, what aircraft companies did you call, and if conversations were had at the aircraft companies, state who was present and what was said.

68. Were assignments made executed and delivered to the aircraft company orders?

69. If your answer is yes to the foregoing in-

terrogatory, attach copies to your reply to these interrogatories.

70. Did you come to the City and County of San Francisco in the month of March, 1949?

71. If your answer is yes to the foregoing interrogatory, did you have a conversation or conversations with Frederick H. Montgomery at the office of Montgomery Brothers, 1122 Howard Street, San Francisco, California?

72. If your answer to the foregoing interrogatory is yes, to the best of your recollection, who was present at these conversations and what was said by the parties who participated at said conversations?

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 1, 1950.

[Title of District Court and Cause.]

ANSWERS OF J. M. STORKERSON TO
INTERROGATORIES

To: Christin, Keegan & Carroll, Attorneys for Defendants and Cross-Complainants W. R. Montgomery and Frederick H. Montgomery, doing

business under the firm name and style of Montgomery Brothers:

Pursuant to your request for interrogatories, J. M. Storkerson answers each interrogatory as follows:

1. Vice President and General Manager.

2. Yes.

3. Yes.

4. Yes.

5. Yes.

6. Not that I remember.

7. To the best of my recollection the substance of the conference was as follows:

I said that I had come West to work out the procedure for putting through the termination of the contract. One of the Montgomery brothers asked what the reasons of the termination were. I gave Dr. Walter's letter to the Montgomerys. I said there was no point in arguing over the past; that I wanted to work out the arrangements for where we went from here. One of the Montgomerys asked me about Fenwal's plans for selling on the West Coast. I told them we were considering setting up a Los Angeles office. Further than that the plans had not been formulated. Mr. W. R. Montgomery asked whether the Montgomery Brothers could continue to represent us in the northern part of the West Coast. I said I would be willing to discuss that possibility with them, but I was out here to

clean up the termination matters first. Fred Montgomery said that they had various suggestions for provisions for an agreement for working out the termination problems. I said I would submit these suggestions to Dr. Walter. Later on I told Montgomery Brothers that Dr. Walter would write them a letter, in substance adopting the Montgomery terms and specifying the provisions for termination. I said that I suggest Ray Montgomery visit the major accounts in the Los Angeles area to work out the transition from the Montgomery Brothers to Fenwal in handling those accounts so that our customers would not be involved in the clean-up work between Fenwal and Montgomery.

During this conversation the Montgomery brothers said that Ed Hawkins had resigned and they understood that he was going to work for Fenwal in the prospective Los Angeles office. I said that we had made no arrangements with Hawkins and we had not even invited him to enter our employ. I also said that I intended to see Hawkins and to discuss with him such a possibility. To this statement neither of the Montgomery brothers, as far as I can remember, made any answer or comment.

8. Yes.

9. Yes.

10. These conferences extended over a good part of two days and a good part of the Los Angeles territory and ended up in the Savoy Hotel. Prior to the meeting in the Savoy Hotel Hawkins, Ray Montgomery and myself were present from time to

time and others were present from time to time. In the Savoy Hotel just Hawkins, Ray Montgomery and myself were present.

11. Yes—sometime during the San Francisco conference.

12. To the best of my recollection, the conversation was as follows:

During this conversation the Montgomery brothers said that Ed Hawkins had resigned and they understood that he was going to work for Fenwal in the prospective Los Angeles office. I said that we had made no arrangements with Hawkins and we had not even invited him to enter our employ. I also said that I intended to see Hawkins and to discuss with him such a possibility. To this statement neither of the Montgomery brothers, as far as I can remember, made any answer or comment.

13. Yes—during the conference in San Francisco.

14. To the best of my recollection, during the talk about Dr. Walter's letter of January 20th, in substance one of the Montgomery brothers said isn't there some reason other than those expressed in the letter and I said I am not here to discuss the reasons.

15. Nothing that I recall at the present time.

16. To the best of my recollection, Fenwal told and wrote Montgomery Brothers from time to time concerning items of dissatisfaction.

17. I think it was around that time.

18. Just W. R. Montgomery and myself. To the best of my recollection, in substance, Mr. W. R. Montgomery gave me orally a list of the items that he wanted me to report to Mr. Robinson, our Sales Manager who handled the Montgomery accounts. I don't remember the details of the items.

19. No.

20. No answer required.

21. On January 1, 1949.

22. This conversation was by telephone. To the best of my recollection, the substance was: Mr. Hawkins said he was calling from his home in Los Angeles. He said he had heard of the termination of Fenwal's contract with Montgomery Brothers. He asked if he could have the job of representing Fenwal in Los Angeles. I said that I have nothing to discuss along those lines at the present time.

23. Myself.

24. The first week of February, 1949.

25. Yes.

26. While in Los Angeles around January 27, 1949, the information was given orally to W. Ray Montgomery.

27. Not that I remember.

28. To the best of my recollection, the substance of the conversation was as follows:

One of the Montgomery brothers said that they felt they were entitled to full profit on every single

order they could place with us up to the end of the termination period. I said that it was Mr. W. J. Turenne's understanding when the agreement was originally drawn that Montgomery Brothers, when cancelled upon 60 day notice, were through on the 60th day and were not entitled to any further profits; that Mr. Turenne had told me that the agreement was drawn with the express understanding that termination in 60 days meant just what it said with reference to business between Montgomery Brothers and Fenwal. I then said that I would propose, however, that on all orders placed by them which we had acknowledged that they would receive full profit; that on all further orders which were placed with us up to the end of the termination period and shipped within that period, they would also receive full profit; that what I wished to negotiate with them is the adjustment of profits on orders placed after January 1 for delivery thereafter. The result of this conversation was a proposal by Mr. Fred Montgomery which was later reduced to writing in Dr. Walter's letter of February 4.

29. Yes.

30. The discussion about the terms contained in this paragraph is included in the discussion reported in my answer to Interrogatory No. 28.

31. No.

32. No answer required.

33. I have stated the substance of all that I

recall at this time as having been said at the conference in San Francisco.

33a. No. I had discussions over the telephone with Fenwal regarding proposal made by the Montgomery Brothers which was later incorporated in Dr. Walter's letter of February 4, 1949.

34. Yes.

35. Following the conference on January 24 in San Francisco I went to Los Angeles and had further conferences with W. R. Montgomery commencing January 27th.

36. Yes.

37. January 27, 1949.

38. Myself, and most of the time W. R. Montgomery, and some of the time Edgard Hawkins and possibly others whose names I don't remember.

39. To the best of my recollection, the substance of the conversation was:

I said Fenwal has employed Hawkins to handle a Los Angeles office that Fenwal would open shortly and that I wanted to work out with Montgomery Brothers procedures for the transition period. Mr. Montgomery said that Montgomery Brothers would work out arrangements with Hawkins for the completion of Hawkins' work with them.

There were many conversations about the details of open accounts and customers, which I do not remember at the present time.

40. I went with W. Ray Montgomery to the

Douglas Aircraft Co. on the afternoon of January 27th or 28th. Frederick H. Montgomery was not present.

41. To the best of my recollection, from time to time during the conversation at Douglas Aircraft Co. there were present: myself, Mr. W. R. Montgomery, Mr. Edgar Hawkins, Mr. Dorn and Mr. Ferguson. To the best of my recollection, the substance of the conversation was as follows:

Mr. Montgomery said to Mr. Dorn that Fenwal was taking over the handling of the business with Douglas and that everybody wanted to make the transition as smooth as possible for the customers. He said that Fenwal would be in touch with Douglas later on.

42. I don't remember.

43. Yes.

44. These conferences were either on January 27 or January 28th. To the best of my recollection, those present were myself, Mr. W. Ray Montgomery, Mr. Edgar Hawkins and representatives of North American Aircraft and Lockheed Aircraft respectively. To the best of my recollection, the substance of the conversation was as follows:

Mr. Montgomery said to the representatives of North American Aircraft and Lockheed Aircraft respectively that Fenwal was taking over the handling of the business with those companies and that everybody wanted to make that transition as smooth as possible for the customers. He also said that Fenwal would be in touch with them later on.

45. No.

46. No answer required.

47. Yes.

48. To the best of my recollection, the substance of the conversation was as follows:

At this conference Mr. Montgomery said that he had been in contact with his brother and that they wanted to reopen certain considerations. He said that they wanted to see the contract we would offer regarding the northern section of the Pacific territory before acceding to the termination agreement, and he outlined a number of details in which he wanted the conditions to be changed in his favor. I said to W. Ray Montgomery that I felt that they were definitely breaking an agreement reached in good faith in San Francisco. I said that we had developed an agreement in San Francisco which I was executing to the letter, and now he had new demands and was not honoring the previous agreement. I told him further that the points covered with me by Fred Montgomery had been translated verbatim as a basis of agreement to Fenwal, Inc.; that a letter was being issued by Dr. Walter on the basis of those points. I said that I certainly did not think that they were being either fair or acting in good faith when they accept an agreement in San Francisco and then disavow that agreement by bringing up new points and pressing for greater advantage. Mr. Montgomery then said that the summary of agreement presented to me by Fred Montgomery was no basis for agreement at all; that

they merely presented it as a basis of argument and had changed their minds. He then outlined certain demands for larger discounts on small orders; he said that they would not agree to any termination arrangement without seeing the final new contract. I said that I would make no new commitments; that I had already gone further than I should have; that our letter on the termination agreement would stand; and that I would consider his new demands but that he must recognize that the proposed contract must be in line with other representatives' contracts and that I would not commit myself on the new demands. I said that Dr. Walter's letter would soon be in their hands.

49. At some time there was a discussion about Boeing, the substance of which, to the best of my recollection, was as follows:

Mr. Montgomery asked if they would be allowed to continue to handle Boeing. I told them that I did not know but that if that took place, Boeing's orders would have to be made out to Fenwal and their (Boeing's) orders would have to be handled direct through the Montgomery Seattle office to Fenwal without going through the Montgomery office in San Francisco.

50. I don't remember.

51. No.

52. I had told Mr. W. Ray Montgomery.

53. Yes.

54. I attach copies of letters of May 20, 1947,

and June 20, 1947. There may be others which I have not located.

55. I have a financial statement of Fenwal, Incorporated, for December 31, 1948.

56. A copy is attached.

57. Yes.

58. Yes.

59. I saw Mr. W. Ray Montgomery in various places in the Los Angeles area and had many conversations with him over the three-day period of March 9, 10 and 11, 1949. Various people were present from time to time. To the best of my recollection, the substance of the conversation with Mr. W. R. Montgomery was as follows:

I said that I had come to Los Angeles to free the unfilled orders so that our customers could get service. Mr. Montgomery asked what was the best thing to do about the customers' accounts. I said that Montgomery Brothers should immediately assign to Fenwal every open order on the West Coast and that we would agree that such an assignment would be without prejudice to whatever claims, if any, Montgomery Brothers might have against Fenwal. Mr. Montgomery said that would be satisfactory to him. We announced our arrangement to our customers.

Towards the end of the discussions Mr. W. Ray Montgomery asked me to go to San Francisco and to see his brother, Fred, to attempt to work out

some of our mutual problems. I said that I would go to see Fred in San Francisco.

60. Intermittently.

61. Mr. Robinson was and is our Sales Manager.

62. Yes.

63. See answer to Interrogatory No. 59.

64. I saw Mr. Montgomery in Los Angeles on various occasions over the period, I believe, of March 9, 10 and 11, 1949.

65. See answer to Interrogatory No. 59.

66. See answer to Interrogatory No. 59.

67. As I remember it, we called on Lockheed, Northrop, Douglas, North American, Boeing, and probably some others that I do not remember. I do not remember just who was present at each of these visits other than Mr. W. Ray Montgomery and myself. To the best of my recollection, the substance of the conversation was:

Mr. Montgomery asked the customer's representative to assent to an assignment to Fenwal by Montgomery Brothers of all open orders. In each instance the representative of the aircraft plant said Yes.

68. Yes.

69. See copies attached.

70. Yes.

71. Yes.

72. Mr. Fred Montgomery and I were present and, to the best of my memory, Mr. Robinson was present for part of the discussions. Maybe some others were present from time to time but I do not remember.

To the best of my recollection, the substance of the conversation was as follows:

Mr. Fred Montgomery asked what we wanted to do about the large number of orders that we had returned to him unaccepted; that they were small orders and in the aggregate did not amount to much; that they were too small to bother with the assignment procedures. I suggested that Fenwal would take care of those customers as promptly and expeditiously as possible and that we would make shipments on them if we had a guarantee from some bank that the payments would be made on them.

Mr. Montgomery in my presence telephoned a bank. At the end he turned to me and said that the bank would give me a letter of guarantee.

I said that Fenwal would fill all orders in his hands at the price to be paid by the customer. Mr. Montgomery said that this would be satisfactory.

Mr. Montgomery asked about the small orders which would continue to come into their office from then on. I said that we would honor these orders under the bank guarantee until Fenwal would decide what we were going to do about the entire affair.

I asked Mr. Montgomery what his best terms were for settling the whole affair. He told me that he wanted all the profit that they would normally receive under the contract to the completion of all

orders on hand. I said that they were not entitled to their normal profit because they were no longer performing the functions of a representative including credit collections, service, adjustments, etc. Mr. Montgomery said that they would offer to settle the entire affair upon the basis of Fenwal agreeing to pay Montgomery Brothers the normal commission less five per cent (5%) off on unfilled orders. I said that offer was not reasonable but that I would submit it to the people at home.

/s/ J. M. STORKERSON.

Commonwealth of Massachusetts,
Suffolk—ss.

Boston, Mass.

March 10, 1950.

'Then personally appeared the above-named J. M. Storkerson and made oath that the foregoing answers were true to the best of his recollection and belief.

/s/ ANTHONY BRAYTON,
Notary Public.

Inter-Office Correspondence

From

Montgomery Brothers
San Francisco 3

May 20, 1947

To: Fenwal, Inc.

Subject: Account.

Attention: Mr. A. C. Drew, Comptroller

Dear Mr. Drew:

We are attaching hereto our check covering April invoices in the amount of \$10,184.92. Also, replying to your letter of May 16th, we are attaching hereto copies of our remittance advice covering our payment of \$19,190.24.

At the time we sent you our check, we attached copies showing what our payment covered. However, same must have been detached before this reached your desk.

Regarding the second paragraph of your letter of May 16th, we are adding the \$17.10 to our remittance of today.

From the copies of your statements, which we are attaching, covering our payment of \$19,190.24, from which we took 1% cash discount that you are objecting to, if you will refer to these statements you will see that on December 31st you owed us \$22,687.79, in January you owed us \$16,183.98, and in February you owed us \$13,371.62.

We wrote you on January 16th asking that you please send us a check in order to balance the account, as we needed the money at that time to pay

taxes, etc. However, according to Mr. Robinson's letter, you were not in a position to do so. Therefore, we were obliged to let this account stand, and we feel perfectly justified now in taking the discount of \$191.90.

We religiously pay all our accounts on the 10th of the month. If we could get your invoices rendered correctly with the correct discount, and also if we could get a statement from you each month by the 10th of the month, we would have your check in the mail every month on the night of the 10th. For instance, the last statement we received from you was for January, February and March. This was not sent us until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statement each month.

We also note in the third paragraph of your letter of May 16th you are questioning some of the deductions we made, as follows:

Invoice #7-481	\$64.75
" #7-523	64.75
" #7-1375	64.75

If you will refer to your latest discount schedules on switches in quantities from 1,000 to 2,499, your discount is 50 and 5%. That is the discount which we must give our manufacturers. We as representatives receive an additional 15%. Therefore, your invoices were rendered less 50 and 10%, whereas they should have been less 50-5-15%. There

is, therefore, credit due us on these three invoices of \$64.75 each. This also applies to Invoice #7-2358. There is a credit of \$34.75 due us on that, as this applies to the same purchase order.

The following are also corrections made on your invoices, deductions which we have taken, and we should receive your credit memorandum for these amounts:

Invoice #7-1083: The correct price of these switches is \$9.50 and not \$11.00, as you show on your invoice. There is, therefore, a credit due us of \$35.70. We refer you to Mr. E. B. Pierce's letter of February 19th substantiating this price.

Invoice #7-2454	Less 20%	Credit due	\$.06
" #7-2861	"	"	26.10
" #7-2862	"	"	8.70
" #7-2863	"	"	26.10
" #7-2864	"	"	26.10
" #7-2961	"	"	17.40
" #7-2962	"	"	52.20
" #7-2963	"	"	52.20
" #7-2964	"	"	52.20

There is one old item of November 29, 1945, Invoice #5-8379, of which you still show that we owe you \$248.20. This is definitely not correct. If you will refer to the invoice, you will see you have charged us \$9.25 for S-2223 Thermoswitch. In the past two years we have purchased thousands of S-2223 from you, and our price has always been \$8.40, less 20%.

When you rendered this invoice in 1945, you

showed a price of \$9.25, less 50 and 10%. Your invoice called for \$1,519.31. It is regrettable that we did not pay your invoice as you rendered it, thereby closing the matter out. However, in our honesty we paid you the invoice in the correct amount of \$8.40 each, less 20%, paying you the amount of \$2,452.80. We would have saved \$933.49 had we not corrected your error. If \$9.25 was the correct price for an S-2223 Thermoswitch, we are wondering why you only allowed us \$8.40 on all the returns that Lockheed made, when we should have gotten credit for \$9.25. Please review your files on this, and delete this old balance of \$248.20 from our account.

With our payment today, we feel that our account is paid in full to May 1st. We also hope that you will see your way clear to send us your statement each month so we can have it by the 10th of the month, and we will see that your check gets in the mail that night.

Very truly yours,

MONTGOMERY BROTHERS.

RJP:is

cc Accounting Dept.

June 20, 1947

From

Montgomery Brothers
San Francisco 3

To: Fenwal, Inc.

Subject: Account

Attention: A. C. Drew, Controller.

Dear Mr. Drew:

We wish to thank you for your letter of June 13th, and are very happy to note that we are getting some of the old charges which you have been showing against our account straightened up. We also wish to advise that our check for the May account was mailed you, as promised, on June 10th, in amount of \$42,438.52. We also wish to state that we will continue to send our check promptly on the 10th of the month if you will see that your statement is mailed to us in time for us to check the bills by that time.

Regarding our Debit Memo 264, we are attaching hereto our Credit 341 cancelling this Debit Memo. However, our Debit Memo 265 we regret we are unable to cancel. We requested this by Railway Express. However, you shipped it Air Express, which was not authorized by us or our customer. Therefore we cannot allow this amount. Air Express amounted to \$4.91, and Railway Express on 6 pounds would be \$1.03. Therefore we feel that the difference of \$3.88 should be paid by you.

Our Debit Memo 307 was also shipped by Air

Express, which should have been shipped Railway Express. This refers to our P. O. 24667, your S-21992, covering shipment of July 31, 1945, to the Lockheed Aircraft Corporation. For your convenience, we are attaching hereto copy which was sent to you in May of this year.

Regarding the material returned on Debit Memo 294 and 295, we have contacted our Los Angeles office as to how and when this material was shipped. We will put a tracer on same, and advise you of our findings.

Trusting that you will check into these remaining Debit Memos and be able to issue us credit as requested, we are

Very truly yours,

MONTGOMERY BROTHERS.

RJR:is

cc Accounting Dept.

Fenwal Incorporated
Ashland, Massachusetts
Balance Sheet at December 31, 1948

Assets	
Cash	\$ 66,068.95
Cash Advances—Drawing Account	160.00
Accounts Receivable	\$107,779.77
Less—Reserve for Sales Returns	8,508.40
	99,271.37
Inventories	130,123.44
Total Current Assets	\$295,623.76
Fixed Assets (Depreciated Value)	121,852.73
Patent Rights	50,000.00
Prepaid Expenses	8,896.62
	<u>\$176,373.11</u>

Fenwal Incorporated
Ashland, Massachusetts
Balance Sheet at December 31, 1948

Liabilities	
Accounts Payable	\$ 9,739.23
Notes Payable—Miscellaneous	11,086.07
Accrued Payroll	—0—
Payroll Taxes and Deductions	4,846.59
Prior Years' Federal Income Taxes and Interest.....	63,319.73
1948 Federal Income Taxes	21,794.51
Massachusetts Income and Local Taxes	5,059.97
Accrued Expenses (Monies due Officers, Commissions)	28,632.77
Employees' Profit Sharing	20,087.78
Interest	3,014.76
Insurance	1,041.96
Sales Taxes	2.65
 Total Current Liabilities	 \$168,626.02
First Mortgage Payable—Due October 1, 1953.....	79,468.43
Capital Stock	\$100,000.00
Surplus, December 31, 1948	128,278.66 228,278.66
 Total Liabilities	 \$476,373.11

Note: A claim has been made by General Accounting Office U. S. Government for excessive royalties paid in the years 1944 and 1945 in the amount of \$17,364.25. If this claim is sustained the cost to the corporation, after adjustment for federal income taxes paid, will be \$13,267.41.

2113 South San Pedro Street
Zone 11

March 10, 1949

Lockheed Aircraft Corporation
Burbank,
California

Attention: Mr. J. V. McCheeney

Subject: Assignment of Fenwal Thermoswitches on
Orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated

have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of the unshipped balances on the following Lockheed Purchase Orders:

Lockheed Purchase Orders

33-23783	33-23714	33-23771	29-06653
33-26778	33-23715	33-13299	29-06654
33-26781	33-23786	33-10182	
33-26430	33-21098	33-10183	
33-20601	33-05066	33-13298	
33-23782	33-23713	33-23789	
33-05058	33-23712	33-11478	
33-05055	33-18415	33-11479	
33-23785	33-11414	33-13901	
33-23784	33-16414	33-23791	
33-31897	33-13290	33-23790	
		33-26780	

The name of the seller under the above-purchase orders covering the quantities of the unshipped balances shown above should be changed from Montgomery Brothers to Fenwal Incorporated. Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject orders and in the amounts referred to above and will perform and comply with all of the terms and conditions thereof.

It is understood that the Lockheed Aircraft Corporation will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and that they will be billed by Fenwal Incorporated and make payment to them. Any

rejections or reworks will be handled by Fenwal Incorporated.

The Lockheed Aircraft Corporation agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

2113 South San Pedro Street
Zone 11

March 10, 1949

Boeing Aircraft Company
Seattle, Washington

Attention: Mr. Frank L. Dobbins

Subject: Assignment of Fenwal Thermoswitches
on orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The Boeing Aircraft Company agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ash-

land, Massachusetts, and the other copy to Montgomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
Boeing Aircraft Company.

2113 South San Pedro Street
Zone 11

March 10, 1949

AiResearch Mfg. Company
9851 Sepulveda Blvd.
Los Angeles 45, California

Attention: Mr. P. Sorella—Buyer.

Subject: Assignment to Fenwal Thermoswitches
on orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all

purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The AiResearch Manufacturing Company agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ashland, Massachusetts, and the other copy to Mont-

gomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
AiResearch Mfg. Company.

March 10, 1949

Douglas Aircraft Co., Inc.
Santa Monica, California

Attention: Mr. W. G. Doran.

Subject: Assignment of Fenwal Thermoswitches
on orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete

Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The Douglas Aircraft Co., Inc., agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ashland, Massachusetts, and the other copy to Montgomery Brothers, 1122 Howard Street, San

Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
Douglas Aircraft Co., Inc.

2113 South San Pedro Street
Zone 11

March 11, 1949

North American Aviation, Inc.
Municipal Airport
Los Angeles 45, California

Attention: Mr. Hulen Nagley,
Purchasing Agent.

Subject: Assignment of Fenwal Thermoswitches
on Orders with Montgomery Brothers
to Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all purchase orders which now read Montgomery

Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The North American Aviation, Inc., agrees to send to Fenwal Incorporated a duplicate copy for Montgomery Brothers of any and all change orders that may be issue dagainst these assigned orders and if any of these assigned orders are cancelled and a ne worder issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, North American is to issue a duplicate copy of their purchase order to Fenwal Incorporated for Montgomery Brothers.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ash-

land, Massachusetts, and the other copy to Montgomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:

North American Aviation, Inc.

2113 South San Pedro Street
Zone 11

March 11, 1949

Northrop Aircraft, Inc.

Northrop Field

Hawthorne, California

Attention: Mr. J. G. Hebard.

Subject: Assignment of Fenwal Thermoswitches
on Orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all

purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The Northrop Aircraft, Inc., agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwall product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ashland, Massachusetts, and the other copy to Mont-

gomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
Northrop Aircraft, Inc.

March 9, 1949

Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Gentlemen:

It is understood and agreed by and between Montgomery Brothers and Fenwal Incorporated that Montgomery Brothers in assigning to Fenwal Incorporated any and all unfilled orders for Fenwal products that it does not constitute a waiver of any of the rights of either Montgomery Brothers against Fenwal Incorporated or Fenwal Incorporated against Montgomery Brothers, arising out of contracts between them.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date: March 10, 1949.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

Date: March 10, 1949.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 17, 1950.

[Title of District Court and Cause.]

INTERROGATORIES DIRECTED TO C. W.
WALTER AND ANSWERS TO INTER-
ROGATORIES

To: McCutchen, Thomas, Matthew, Griffiths &
Greene, and Felix F. Stumpf, Esq., Attorneys
for Plaintiff and Cross-Defendant Fenwal In-
corporated, a Corporation:

Pursuant to the provisions of Rule 33 of the
Federal Rules of Civil Procedure, the defendants
herein address to the plaintiff Fenwal, Incorporated,
the following interrogatories to be answered
separately, fully and under oath by C. W. Walter,
President of Fenwal, Incorporated:

1—Q. Are you an officer of Fenwal, Incorporated,
a corporation? A. Yes.

2—Q. If so, what office do you hold, and did
you occupy this office in the months of October,
November and December, 1948, and January, February
and March, 1949?

A. I have been President continuously since
1943.

3—Q. Do you know Edgar V. Hawkins?

A. Yes.

4—Q. When did you meet Edgar V. Hawkins?

A. May 20, 1948.

5—Q. Did you have a conversation with Edgar
V. Hawkins in the City of Los Angeles, California,
in the month of September, 1948? A. Yes.

6—Q. If your answer to the foregoing interroga-

tory is yes, where was the conversation held, who was present at the conversation, and what was said by all parties who participated in the conversation?

A. We met in Pierres' Restaurant in San Marino in September, 1948. Our wives and four of our children were present.

To the best of my recollection, the substance of the conversation was as follows:

The social conversation was irrelevant.

We discussed the arrangements for a visit to the Lockheed plant for Dr. Charles Hufuagel, a colleague, and myself.

I asked if he had developed any suggestions for the improvement of Fenwal's service to its customers or means of obtaining better representation to industry as a whole. I stated that Fenwal was dissatisfied with the post-war sales trend in West Coast business and stated that greater effort must be expended in obtaining industrial, in contradistinction to aircraft, business.

Hawkins stated that little could be accomplished to obtain these ends under Montgomery Brothers' policy. He said there was discontent within the Montgomery organization which had reached the point that he and others were planning to leave no later than March 1, 1949. He mentioned tentative plans they had to set up as manufacturers' representatives and said that they were looking for accounts. I asked him for details, but he said he could say nothing until he had discussed matters further with the others. I said that Fenwal would entertain a proposal from the new group, but that

personally I thought the company would be interested in learning about the desirability of a factory office in Los Angeles. Hawkins said he was surprised at that, and the remainder of the conversation was about the relative merits of a factory office and a sales agency in the Los Angeles area, the details of which I do not remember.

7—Q. Did you have any other conversation with Edgar V. Hawkins in Los Angeles during 1948 and after September, 1948? A. Yes.

8—Q. If your answer to the foregoing interrogatory is yes, where did that conversation take place, who was present, and to the best of your recollection what was said by each person who was present?

A. After a trip through the Lockheed plant, Dr. Hufuagle, Hawkins, and I had dinner together and later retired to Dr. Hufuagle's room at the Hotel San Carlos.

To the best of my recollection, the substance of the conversation was as follows:

Hawkins asked me to tell him about Fenwal's set-up and policies. I told him facts which were known by Fenwal's employees and by commercial credit agencies, but I do not remember the details. There was some further discussion of the type of sales representation in Los Angeles which might be adopted by Fenwal, but I do not remember the details. I had no further conversation with Mr. Hawkins in Los Angeles during 1948.

9—Q. Did you at any time ever offer to employ Edgar V. Hawkins on behalf of Fenwal, Incorpo-

rated, either as a manager, representative or employee? A. No.

10—Q. If your answer to the foregoing interrogatory is yes, state when and where said conversation was had and what was said by you and by Edgar V. Hawkins?

A. None required.

11—Q. Is there any correspondence in existence between Fenwal, Incorporated, and Edgar V. Hawkins, or copies thereof wherein the matter of employment of said Edgar V. Hawkins is referred to?

A. No.

12—Q. If there is such correspondence or copies thereof, kindly attach correspondence or copies thereof to your reply to these interrogatories.

A. None required.

[Interrogatories:]

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants.

[Answers to Interrogatories:]

/s/ CARL W. WALTER.

Commonwealth of Massachusetts,
Suffolk—ss.

Boston, Mass.,
March 11th, 1950

Then personally appeared the above-named C. W. Walter and made oath that the foregoing answers

were true to the best of his recollection and belief.

[Seal] /s/ ANNIE P. THURSTON,
Notary Public.

Receipt of Copy acknowledged.

Interrogatories endorsed and filed March 1, 1950.

Answers endorsed and filed March 20, 1950.

[Title of District Court and Cause.]

STIPULATION

1. That the amount due from defendant and cross-complainant to plaintiff for shipments made in January and February, 1949, less credits for merchandise returned, is \$46,635.40.

2. That the amount to which defendant and cross-complainant, Montgomery Brothers, would be entitled if profit were allowed on all orders is \$36,525.20, less profit on such orders as may be cancelled by the purchaser.

3. That the amount to which said defendant and cross-complainant would be entitled if profit were allowed on all shipments made up to the effective date of termination is \$0, since profit was obtained on all such shipments.

4. That the amount to which said defendant and cross-complainant would be entitled if profit were allowed on all orders accepted prior to the effective

date of termination for delivery thereafter is \$17,-
361.46, less profit on such orders as may be can-
celled by the purchaser.

Dated: July 14, 1950.

/s/ MORRIS M. DOYLE,

/s/ FELIX F. STUMPF,

McCUTCHEON, THOMAS,

MATTHEWS GRIFFITHS &
GREENE,

Attorneys for Plaintiff and
Cross-Defendant.

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. KRISTIN,

Attorneys for Defendant and
Cross-Complainant.

[Endorsed]: Filed July 14, 1950.

[Title of District Court and Cause.]

MEMORANDUM RE PROPOSED JUDGMENT

First. The cross-complainant should be dismissed. In my view, defendants have not shown by a preponderance of the evidence that plaintiff "induced" Hawkins to leave defendants' employ.

Second. Strict application of the law of Sales, as contended for by plaintiff, seems harsh, and frankly, my leaning has been to find a way to avoid strict application of the rule.

I will be glad to consider letter memoranda, to be forwarded to me at Portland, on this proposition: Since the contract did not itself provide a formula for settlement of business developed during the termination period, the parties had either to agree on a formula, submit the matter to arbitration, or go to court. They endeavored to agree, and while the discussions were going on, defendants chose to withhold payment for January business. Plaintiff deemed this harsh, indeed, in its financial condition, unbearable, and broke off negotiations.

Did this deprive defendants of the right to call, as they are calling now, for a court evolved formula for construction of the termination clause? It seems to me not. I recognize the force of able counsel's contention that defendants "imposed a condition they had no right to impose"—namely, that defendants would not pay until the question of a new contract was settled. But the answer to that is, I feel, that the question of a new contract had be-

come an important part (despite Storkerson's initial efforts to keep it separate) of the settlement discussions.

As indicated, if counsel care to write me, either in support or criticism of what is here stated, I will wait a reasonable time, meanwhile treating the suggestions stated as tentative grounds for decision only.

Dated at San Francisco, California, this 20th day of July, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

After consideration of the parties' letter arguments, which I appreciate, I feel that defendants are entitled to their profit on all orders accepted, on a quasi-contract basis—benefit to plaintiff.

Findings and form of judgment may be submitted.

Dated at Portland, Oregon, this 8th day of August, 1950.

/s! CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed August 10, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 11th day of July, 1950, before the above-entitled court, Honorable Claude McColloch presiding, sitting without a jury. Morris M. Doyle, Esq., and Felix S. Stumpf, Esq., appeared for plaintiff, and Charles A. Christin, Esq., appeared for defendants. Evidence, both oral and documentary, having been introduced and the court being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

Findings of Facts

The court now finds as follows:

I.

That the allegations of paragraphs 1, 2, 3 and 4 of plaintiff's complaint on file herein are true, except that plaintiff did not reimburse defendant for sales made by defendant prior to said termination date and delivered by plaintiff subsequently thereto; that the allegations of paragraph I of defendants' answer are true.

II.

That it is true that defendants are indebted to plaintiff under the contract referred to in the complaint and answer for goods sold and delivered by plaintiff to defendants from January 1, 1949, through February 23, 1949, on orders placed by defendants with plaintiff, pursuant to said contract.

That pursuant to stipulation of the parties hereto filed herein on July 14, 1950, such indebtedness is the sum of \$46,635.40. That it is true that defendants have failed and refused to pay said sum or any part thereof although plaintiff demanded payment thereof.

III.

That the allegations of paragraph II of defendants' answer on file herein are untrue.

IV.

That it is true that certain orders were placed by defendants with plaintiff prior to February 28, 1949. That said orders were accepted by plaintiff, filled and delivered by said plaintiff after February 28, 1949, which resulted in a financial benefit to said plaintiff in that plaintiff realized a profit on the articles so sold and delivered, and further benefitted by the continuation of business between the plaintiff and the buyers thereof; that the services rendered by defendants in obtaining and filing of said orders with plaintiff were not gratuitously performed. That pursuant to the stipulation of the parties hereto filed July 14, 1950, the profits of defendants upon all orders obtained by the defendants and filled by the plaintiff would be \$36,525.20.

That said sum of \$36,525.20 represents the profits which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of said contract and accepted by plaintiff. Shipments of said goods were made by plaintiff

to defendants' said customers under an assignment from defendants to plaintiff, which said assignment was made without waiving the rights of either defendants or plaintiff.

V.

That it is not true that plaintiff induced Edgar V. Hawkins to leave defendants' employ.

Conclusions of Law

From the foregoing facts, the court concludes:

1. That plaintiff is entitled to recover from defendants the sum of \$46,635.40 for goods sold and delivered by plaintiff to defendants.

2. That defendants are entitled to an offset against said sum of \$46,635.40 in the amount of \$36,525.20.

3. That the second ground of cross-complainant set forth in defendants' answer and cross-complaint be dismissed.

4. That plaintiff is entitled to judgment for \$10,110.20 with interest thereon from February 23, 1949, to the date of judgment herein at the rate of 6 per cent per annum. Costs to neither party.

Let judgment be entered accordingly.

Dated: September 4, 1950.

/s/ CLAUDE McCOLLOCH,
Judge of the United States
District Court.

[Endorsed]: Filed September 8, 1950.

United States District Court for the Northern
District of California, Southern Division

No. 28851-R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY and FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a Partnership,
Defendants.

W. R. MONTGOMERY and FREDERICK H.
MONTGOMERY, Doing Business Under the
Firm Name and Style of MONTGOMERY
BROTHERS,

Cross-Complainants,

vs.

FENWAL, INCORPORATED,

Cross-Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 11th day of July, 1950, before the above-entitled court, Honorable Claude McColloch presiding, sitting without a jury. Morris M. Doyle, Esq., and Felix F. Stumpf, Esq., appeared for plaintiff and Charles A. Christin, Esq., appeared for defendants. Evidence, both oral and documentary, having been introduced and the court being

fully advised in the premises and having made its findings of fact and conclusions of law,

It is Hereby Adjudged:

1. That the plaintiff have and recover from defendants the sum \$10,110.20 with interest thereon at the rate of 6 per cent per annum from February 23, 1949, to the date hereof;

2. That the second ground of cross-complaint set forth in defendants' answer and cross-complaint on file herein be and the same is hereby dismissed;

3. Costs to neither party.

Dated: September 4, 1950.

/s/ CLAUDE McCOLLOCH,

Judge of the United States
District Court.

[Endorsed]: Filed September 8, 1950.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To: Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, Attorneys, 1500 Balfour Building, San Francisco, Calif.

Messrs. Christin, Keegan & Carrol, Attorneys, Russ Building, San Francisco, Calif.

You are Hereby Notified that on September 11, 1950, a Judgment was entered of record in this office in the above-entitled case.

C. W. CALBREATH,
Clerk, U. S. District Court.

San Francisco, California, September 11, 1950.

In the United States District Court for the Northern District of California, Southern Division
No. 28851-R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK H. MONTGOMERY and MONTGOMERY BROTHERS, a Partnership,
Defendants.

NOTICE OF APPEAL

Notice is Hereby Given that Fenwal, Incorporated, a corporation, plaintiff above named, hereby

appeals to the United States Court of Appeals for the Ninth Circuit from the portions of the final judgment entered in this action on the 11th day of September, 1950, adjudging that the plaintiff have and recover from defendants the sum of \$10,110.20 with interest thereon at the rate of six per cent per annum from February 23, 1949, to the date of said judgment, with costs to neither party.

Dated: October 10, 1950.

/s/ MORRIS M. DOYLE,

/s/ JOSEPH W. GROSSMAN,

McCUTCHEN, THOMAS,

MATTHEW, GRIFFITHS, &
GREENE,

Attorneys for Plaintiff.

[Endorsed]: Filed October 11, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28851-R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK MONT-
GOMERY and MONTGOMERY BROTH-
ERS, a Partnership,

Defendants.

W. R. MONTGOMERY and FREDERICK
H. MONTGOMERY and MONTGOMERY
BROTHERS, Doing Business Under the Firm
Name and Style of MONTGOMERY BROTH-
ERS,

Cross-Complainants,

vs.

FENWAL, INCORPORATED,

Cross-Defendant.

Before: Hon. Claude McColloch,
Judge.

REPORTER'S TRANSCRIPT

July 11, 12 and 13, 1950

Appearances:

For the Plaintiff and Cross-Defendant:

MESSRS. McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS &
GREENE, by
MORRIS M. DOYLE, ESQ., and
FELIX F. STUMPF, ESQ.

For the Defendants and Cross-Complainants:

CHARLES A. CHRISTIN, ESQ.

* * *

JOHN M. STORKERSON

a witness called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the
Court, please?

A. John M. Storkerson.

Direct Examination

By Mr. Doyle:

Q. Where do you reside?

A. I reside in Ashland, Massachusetts.

Q. What is your occupation?

A. My occupation is that of general manager
of Fenwal Incorporated. [19*]

Q. What is Fenwal Incorporated?

A. Fenwal Incorporated is a corporation doing
business in Ashland, Massachusetts, its field being

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of John M. Storkerson.)

the manufacture and sale of a thermostatic type of temperature control devices and of various other types of controls and equipment.

Q. How long have you been engaged in this occupation?

A. I have been there since February of 1945.

Q. In the capacity of general manager during all of the time?

A. In the capacity of general manager during four years of that period, and vice-president and general manager during this last year.

Q. You are now vice-president and general manager?

A. Yes.

Q. Are you familiar with the contract entered into between Fenwal and Montgomery Brothers?

A. Yes.

Q. Dated May 26, 1944?

A. Yes, sir.

Q. I show you, Mr. Storkerson, an original agreement dated May 26, 1944, between Fenwal Incorporated and Montgomery Brothers and ask you whether or not that is the agreement to which you have just referred?

A. It is.

Q. I direct your attention to the fact that attached to the [20] agreement is a letter dated May 1, 1944, addressed to Mr. Fred Montgomery, Montgomery Brothers, and signed Fenwal Incorporated, W. J. Turenne, and ask you if that has been treated by the parties as a part of the contract?

Mr. Christin: May I see that again? I didn't have that on my copy.

Mr. Doyle: It is a letter set up in your answer.

(Testimony of John M. Storkerson.)

Mr. Christin: The one set up in my answer, attached to it?

Mr. Doyle: Yes; I thought you had seen it.

Mr. Christin: I haven't seen this letter. We have them separated. Here they are together.

Q. (By Mr. Doyle): I don't think you answered the question, Mr. Storkerson.

The Witness: I didn't see that attachment?

Mr. Doyle: Would you read the question, please?

A. Yes, we did.

Mr. Doyle: Plaintiff offers this as its Exhibit 1.

The Court: It may be admitted.

The Court: Plaintiff's Exhibit 1 in evidence.

(Contract and letter referred to were marked plaintiff's Exhibit No. 1 in evidence.)

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is identical to Exhibit A attached to Answer and Cross-Complaint. See page 5 of this printed record.]

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Was there an amendment to that contract under date of November 11, 1946, if you know?

A. There was an amendment made; I am not positive as to the [21] exact date. I believe that is it.

(Testimony of John M. Storkerson.)

Q. I show you an original agreement consisting of one page, dated October 11, 1946, signed Fenwal Incorporated by J. M. Storkerson and Montgomery Brothers by F. H. Montgomery, and ask you if you identify that agreement as the one to which you have referred in your testimony?

A. That is.

Q. Is that your signature?

A. It is my signature.

Mr. Doyle: I offer this as plaintiff's Exhibit 2.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Contract dated October 11, 1946, marked Plaintiff's Exhibit No. 2 in evidence.)

PLAINTIFF'S EXHIBIT No. 2

[Plaintiff's Exhibit No. 2 is identical to Exhibit B attached to Answer and Cross-Complaint. See page 9 of this printed record.]

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Are you familiar with the course of business under the contract of May 26, 1944, and the amendment of October 11, 1946?

A. I am.

Q. Will you describe that course of business?

A. The course of business was that Montgomery Brothers were to solicit various potential customers

(Testimony of John M. Storkerson.)

throughout the territory assigned to them in order to obtain orders for us.

As their work, the sales work, progressed to the point where an order was secured, it was made out in the name of Montgomery Brothers, and they in turn would place a regular [22] Montgomery Brothers purchase order on our company.

That order would be sent to us at Ashland, and would be entered in our incoming register and sent through departments for a series of processes.

The first would be the editing of the order as to correctness of price, technical details, all of the terms and other features in that order, to make sure that it would be satisfactory to us. It also was sent down through the accounting department for a like approval from the standpoint of prices and any other information that pertained to the financial angles of the particular order.

It would then be—if it was approved by them—the people in the sales department who edited the order and the accounting department—it would be authorized for our people to issue to Montgomery Brothers an acceptance copy of the purchase order, which in most cases did not indicate delivery, other than to say that we would advise the condition of—or we would advise when we would ship the order at a later date, the reason for that being we couldn't always tell at the time the orders came in just how it would fit, into our production schedule.

We would then issue another order on our own shop, which is a copy of the same acceptance, di-

(Testimony of John M. Storkerson.)

rected to the Montgomery Brothers, which usually would go on down to our production planning department, and there the people would check the particular [23] item, all of the materials, components, everything it would take to manufacture; they would check into the production loading on all of our equipment and determine when we could reasonably expect to make delivery. And when that date or schedule was determined, we would send a second acceptance to Montgomery Brothers, which was a complete duplicate of the first one, with the exception that it supplied the delivery information. That order then being on our shop, the production planning department would control the bringing together of the materials, machines and man-power to produce it in accordance with schedule, and it would eventually be placed in our shipping department ready for shipment to Montgomery Brothers.

At that point, very often in this particular business the equipment or material would have to be held for inspection by Army or Navy personnel, because a great deal of it was contract business involving contracts under Army and Navy jurisdiction.

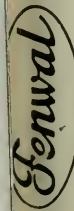
The Court: Are you talking about their business or your business, generally?

A. Their business. We had other equipment contracts from other firms.

Q. During the period of your business with them—which began what year?

FENWAL INCORPORATED

Ashland, Massachusetts, U. S. A.



REG. U. S. PAT. OFF.

OUR ORDER
NUMBER

DATE ENTERED

APPROX.
SHIP. DATE

SHIP VIA

CUSTOMER'S
ORDER NO.

SHIP TO -

SOLD TO -

EXPORT LIC.
IMPORT LIC.

METHOD OF PAYMENT
SALESMAN

TERMS: 10 - NET 30 - F. O. B. ASHLAND. INTEREST CHARGED AFTER 30 DAYS

INVOICE NUMBER

INVOICE DATE

PACKING SLIP NUMBER

DATE SHIPPED

HOW SHIPPED

NET WT.

GROSS WT.

BOX DIM.

QUANTITY
ORDERED

CATALOG
NUMBER

SPECIFICATIONS

UNIT PRICE

BALANCE AFTER
THIS SHIPMENT

QUANTITY
SHIPPED

EXTENSION

ACKNOWLEDGMENT
ONLY
INVOICE WILL FOLLOW SHIPMENT

1
2
3
4
5
6
7

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 3—(Continued)

[Acceptance of Order—Reverse.]

Terms and Guarantees Applying to all Sales
Unless Otherwise Agreed

Terms:

To customers with credit approved by our Treasurer's Office, our terms are $\frac{1}{2}$ per cent discount for cash within 10 days of date of invoice, 30 days net, interest after 30 days. Specifications, prices and discounts quoted are subject to change without notice. Prices are F.O.B Ashland, Mass. All orders are accepted subject to delays occasioned by strikes, accidents, or causes beyond our control.

Claims:

Claims for shortages or errors must be made within five (5) days after receipt of shipment and should be accompanied by our packing slip or photostatic copy of same.

Returns:

No goods are to be returned without our authorization.

Deliveries:

Delivery dates are estimates only.

Cancellation of Orders:

Orders accepted by us may be cancelled only with our consent and subject to such cancellation charge as may be determined by us.

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 3—(Continued)

Deferred Orders:

Customer's changes in delivery schedule on orders which are in process are subject to revision in price or a charge for the work already in process.

Guarantees:

Item 1. Standard Products Guarantee

It is our ambition to have every article bearing the "Fenwal" trade-mark give complete satisfaction. We maintain high standards for our workmanship and materials and for the inspection of our products, but it is not humanly possible to have every piece perfect. Therefore, if we find that any Fenwal product sold under this guarantee shows a defect in material or workmanship within one year after it leaves our factory, Fenwal Incorporated will gladly repair it or replace it without expense to the customer, except for transportation charges. We cannot be responsible for repairs made by others, for apparatus, equipment or parts made by others or for consequential damages.

This guarantee does not apply to damage to our products resulting from corrosion, electrolysis or other injurious operating conditions. No one is authorized to assume for us any liability except as above set forth. Requests that we repair or replace products must be made within

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 3—(Continued)

10 days after discovery of a defect in material or workmanship.

Item 2. Appliance Thermoswitch Guarantee

This guarantee is the same as Standard Products Guarantee except that it extends only 90 days after shipment.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): I direct your attention, Mr. Storkerson, that near the top of the form there appears the typing, "terms $\frac{1}{2}\%$ 10—net, 30, f.o.b. Ashland—interest charged after 30 days" and ask you whether that $\frac{1}{2}\%$ 10 indicated a change from an earlier form in the course of your business under this contract? A. It did.

Q. When was that change made?

A. I don't remember exactly; it must have been—I don't remember, other than it might have been perhaps a year preceding the close of business with Montgomery Brothers; about the first of 1948. I would have to look at the records to determine.

Q. Around the first of 1948 then—

A. Yes.

Q. —a year before the contract was terminated, what had been the stipulated discount rate prior to that time for ten day payment?

A. One per cent.

Q. Do you recall the occasion upon which the

(Testimony of John M. Storkerson.)

contract with Montgomery Brothers was cancelled?

A. I do.

Mr. Doyle: And do you have the original letter of December 29, 1948, from Fenwal to Montgomery Brothers, Mr. Christin? [27]

(Mr. Christin handed a document to Mr. Doyle.)

Q. (By Mr. Doyle): I show you a letter dated December 29, 1948, on the letterhead of Fenwal Incorporated and signed C. M. Walter, president, and ask you if that is the letter of termination?

A. It is.

Mr. Doyle: I offer this document as plaintiff's Exhibit 4.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(The letter dated December 29, 1948, Fenwal to Montgomery, was marked plaintiff's Exhibit 4 in evidence.)

PLAINTIFF'S EXHIBIT No. 4

Air Mail

Registered—Return Receipt Requested

December 29, 1948

Montgomery Brothers

1122 Howard Street

San Francisco, California

Gentlemen:

This will notify you that we elect to terminate

(Testimony of John M. Storkerson.)

our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty (60) days after the receipt by you of this letter.

We believe that it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone but we shall be glad to confer with you about this if you feel that it is desirable that we do so.

Very truly yours,

FENWAL INCORPORATED,

/s/ CARL W. WALTER,

President.

CWW:MM

Received December 31, 1948.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Who is the C. M. Walter who signed that letter?

A. That is Dr. C. M. Walter, who is president of our corporation.

Q. Was then? A. Was then, correct.

Q. And is now? A. And is now.

Q. Was there a reply to that letter of December 29, 1948, do you recall? A. There was.

The Court: I believe it is customary at this time of the morning to take a brief recess. [28]

(Recess.)

(Testimony of John M. Storkerson.)

Q. (By Mr. Doyle): I show you a two-page letter on the letterhead of Montgomery Brothers dated January 7, 1949, and ask you if that was received at the office of Fenwal in Massachusetts?

A. Yes, it was.

Q. Directing your attention to the handwritten entry on the upper right hand corner "Received January 14, 1949, 10 a.m., J.M.S." do you know who put that there? A. I did.

Q. Is that in your hand?

A. It is in my hand.

Q. Are those your initials?

A. Yes, they are.

Mr. Doyle: I offer this document as plaintiff's Exhibit 5.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(Letter dated January 7, 1949, Montgomery to Fenwal, marked plaintiff's Exhibit 5 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 5

[Letterhead]

Montgomery Brothers
1122 Howard Street
San Francisco 3, U. S. A.

January 7, 1949

Registered Mail
Return Receipt Requested
Fenwal Incorporated
Ashland, Massachusetts

Attn.: Dr. Carl Walter, President

Dear Carl:

Answering your letter of December 29, 1948.

First, its contents was quite a surprise to us, especially in view of the fact that since we have been your exclusive Western representatives we have increased the sale of your equipment every year over the preceding year, from a few thousand dollars the first year, to many hundreds of thousands of dollars in 1948.

Secondly, we have expended large sums of money and unlimited man hours by our sales and engineering staff in developing applications and securing orders for your equipment. Further, it was through our joint efforts that we were able to develop satisfactory thermostwitches for the aircraft industry, which has resulted in large volume sales.

Third, you are acting within the terms of our Sales Agreement in terminating same as you have elected to do. However, we will expect you to ac-

(Testimony of John M. Storkerson.)

cept all orders that we place with you until the date of termination of the before-mentioned Sales Agreement regardless of the release schedules and the date of actual shipments as called for in our purchase orders.

Further, on all our orders now at the factory and all orders placed prior to the termination date, we expect shipments to be made and go forward in accordance with shipping instructions.

In closing, we find nothing in our records to indicate that during the years we have been associated together any unpleasant situations or misunderstandings have marred our friendly relations and we will welcome the opportunity of discussing any matters with Mr. Storkerson as undoubtedly he is planning a trip to the Pacific Coast.

Yours very truly,

MONTGOMERY BROTHERS,

/s/ W. RAY MONTGOMERY.

WRM:da

Received January 14, 1949.

[Endorsed]: Filed July 11, 1950.

Mr. Christin: Exclusive of that part which is in the witness' handwriting.

Mr. Doyle: The witness has identified it as having been put on the document by him upon receipt of it. I see no purpose in its exclusion. [29]

(Testimony of John M. Storkerson.)

Mr. Christin: I don't think we are bound by that. It wouldn't be material.

Mr. Doyle: Stipulated that you are not bound by it.

Q. Did Fenwal reply to that communication from Montgomery Brothers? A. We did.

Mr. Christin: Do you intend to read these letters that have come in? You just put them in evidence.

Mr. Doyle: Perhaps some of them. Just at present I will admit them only.

I ask you if you have an original telegram dated January 12, 1949, addressed to Montgomery Brothers and signed Fenwal Incorporated, J. M. Storkerson?

Mr. Christin: Yes (handing document to Mr. Doyle).

Q. (By Mr. Doyle): I show you a telegram dated January 12, 1949, signed Fenwal Inc., J. M. Storkerson, and ask you if that is a communication of that date from you to Montgomery Brothers?

A. It is.

Mr. Doyle: I offer this as plaintiff's Exhibit 6.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Telegram, dated January 12, 1949, Fenwal to Montgomery, was marked plaintiff's Exhibit 6 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 6

[Western Union Telegram]

949 Jan 12 AM 9 10

SFABO 43 PD-WUX Ashland Mass 12 1150A
Montgomery Bros, Attn F H Montgomery
1122 Howard St.

Would Like to Have Discussion With You in San
Francisco January 24th If This Is Agreeable.

FENWAL INC

J M STORKERSON

Received January 12, 1949.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you receive a reply?

A. I did. [30]

Q. I show you a telegram dated January 12 addressed to J. M. Storkerson, Fenwal Incorporated, signed Montgomery Brothers, and ask you if that was the reply? A. It is.

Mr. Doyle: I offer the document as plaintiff's Exhibit 7.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 7.

(Telegram, dated January 12, 1949, Fenwal to Montgomery, was marked plaintiff's Exhibit No. 7 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 7

[Western Union Telegram]

WU3 PD-MK San Francisco Calif Jan 12 414P

J M Storkersen

Fenwal Inc

Retel Will Be Glad to See You January 24 in
San Francisco Regards

MONTGOMERY BROS

F H MONTGOMERY

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did Fenwal make any other reply to the Montgomery Brothers letter of January 7, 1949? A. Yes.

Mr. Doyle: Do you have the original of a letter dated January 20, 1949, addressed to Montgomery Brothers and signed by Fenwal?

(Mr. Christin handed a document to Mr. Doyle.)

Q. (By Mr. Doyle): I show you a letter on the letterhead of Fenwal Incorporated dated January 20, 1949, consisting of two pages, signed Fenwal Incorporated, Carl W. Walter, addressed to Montgomery Brothers at San Francisco, and ask you if you recognize that letter as having been sent on or about its date? A. I do.

Mr. Doyle: I offer the document as plaintiff's Exhibit 8.

(Testimony of John M. Storkerson.)

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 8 in [31] evidence.

(The letter dated January 20, 1949, Fenwal to Montgomery, was marked plaintiff's Exhibit 8 in evidence.)

PLAINTIFF'S EXHIBIT No. 8

January 20, 1949

Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Attention: Mr. W. Ray Montgomery

Dear Ray:

This answers your letter of January 17, 1949.

We see no reason why you should be surprised by our action, as we have repeatedly brought to your attention the fact that we have not been satisfied with your representation of us in the territory covered by our agreement. Our requests and suggestions for improvements have been almost entirely disregarded by you, and we have been reluctantly forced to the conclusion that the termination of our relationship is essential.

The assistance you have rendered in connection with the aircraft business is appreciated. However, you understand that the development of satisfactory Thermoswitches for that industry has been a nation-wide Fenwal effort. You are only one of a number of representatives who have been actively

(Testimony of John M. Storkerson.)

engaged in securing information as the basis of our engineering design and development work.

Fenwal has devised new manufacturing methods and techniques in order to provide satisfactory Thermoswitches for aircraft. Obviously, the principal effort has been that of our factory organization, engineers, and technical personnel.

We note that you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of the release schedules and dates of shipments, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. We expect to fill orders which have been accepted by us or may later be accepted by us, provided you carry out your part of the contract. It seems likely that the filling of those orders will involve an adjustment of the discount or commission allowed to you, but we shall not try to discuss details in this letter.

It is our desire that the termination of our contract should be carried out as smoothly and as pleasantly as is possible for all concerned. We cannot be required to accept orders given to us by you or by anyone else. In view of your failure to give us the type of representation which we have had a right to expect under the terms of our agreement with you, we are surprised that you should suggest that you think we should fill orders in the manner outlined in your letter.

(Testimony of John M. Storkerson.)

Our Mr. Storkerson will talk with you in San Francisco in the near future, and it is our hope that you and he will be able to work out a mutually satisfactory plan for handling the problems which are involved in the termination of our business relationship.

We regret from the personal point of view that the business situation requires us to make other arrangements for the handling of our sales in your former territory.

Very truly yours,

FENWAL INCORPORATED,

/s/ CARL W. WALTER,

By C. W. WALTER,
President.

CW:MM

Received January 24, 1949.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: I direct the attention of the witness to the fact that the opening sentence of this letter is, "This answers your letter of January 17, 1949." I understand, Mr. Christin, it may be stipulated that that was an erroneous reference and that the reference is necessarily to the letter of January 7, 1949, not January 17, 1949.

Mr. Christin: So stipulated.

Q. (By Mr. Doyle): That is your understanding of the intention? A. Yes, sir.

(Testimony of John M. Storkerson.)

Q. Was the letter of January 20th to which you have just referred sent in the usual course of the mail? A. No.

Q. How was it transmitted to Montgomery Brothers, if you know?

A. I delivered it personally to Montgomery Brothers.

Q. In San Francisco?

A. In San Francisco.

Q. What were the circumstances under which the letter was delivered?

A. Well, we had made arrangements for a meeting here on the exchange of telegrams, and I had come here for the purpose of trying to work out an arrangement with Montgomery Brothers for orderly termination of their business with us, they [32] having taken the position that they were entitled to all profit on all orders given regardless of schedules or other conditions, and it was my understanding——

Mr. Christin: I think, your Honor, these are conclusions. We do not object to the conversations from which he draws the conclusion, but not the conclusions.

The Court: He can testify subject to the objection. Go on and tell your story. I like to hear the story the way people want to tell it.

The Witness: When I arrived in San Francisco I told Montgomery Brothers that it was the position of our Mr. Turenne, who was in charge of the company as general manager at the time their negotiations were developed originally——

(Testimony of John M. Storkerson.)

Mr. Christin: Just a moment. You say when you arrived in San Francisco. When was that?

Mr. Doyle: Will you please identify the time, place and persons present in this conversation?

A. Yes; I arrived at their office—if I may make reference to a date in here, I arrived at their office on the morning of Monday, the 24th, and it was their office here in San Francisco.

The Court: What year?

A. 1949. I arrived here at their office on that morning, and met first Mr. Fred Montgomery.

Q. (By Mr. Doyle): Did you deliver the letter of the 20th, first of all? [33]

A. I delivered it as soon as Mr. Fred Montgomery and Mr. Ray Montgomery were together with me in the office.

Q. Anyone else present?

A. No, not that I remember.

Q. State the conversation as best you recall it?

A. They first asked me what the termination was all about, and I gave them Dr. Walter's letter. They both read it and asked me a great number of questions pertaining to the termination. They took the position that—essentially they took the position that they were entitled to all of the profits on all of their orders placed with us up to the end of the termination date. I told them that Mr. Turenne of our company had the understanding that that 60-day termination was to be effective literally, and that after that date it was our position basically that they were not entitled to—

(Testimony of John M. Storkerson.)

Mr. Christin: A little bit louder, please; I can't hear you.

The Witness: I beg your pardon?

Mr. Christin: A little bit louder. I can't hear you.

A. Surely. I told them that it was, therefore, our position that they were not entitled to profits after the 60-day period. I told them that I hadn't come there to argue the past or the termination; I had come there to try to work out an orderly arrangement, and in doing so I immediately set forth a number of points on which we would be immediately willing to proceed [34] with the termination. Those were, as I recall them, first we would give them full profit on all orders which we had accepted, and, secondly, that we would give them full profit on all orders shipped by us during their first two months or during the 60-day termination period if they were shipped, whether or not we had accepted them. I said that on all orders which we hadn't accepted that were to be shipped or where shipments were to be made against them after the end of the termination period, that I felt an adjustment should be made in the profits to be allowed Montgomery Brothers. And I believe I made some suggestions on it.

Q. Did you state any reason why you thought an adjustment should be made?

A. Well, yes, I did.

Q. What did you state?

A. Well, in the first place I felt that that was

(Testimony of John M. Storkerson.)

a very fair offer to Montgomery Brothers, which went away beyond our——

Mr. Christin: If your Honor please, I think that these are legal conclusions,—“I thought it was a fair offer.”

Mr. Doyle: They may go out.

Q. State the reasons that you gave for your proposal, please, Mr. Stockerson?

A. The reasons I gave for the proposal were to give them a fair and equitable settlement arrangement to the best of our ability. And, further, we discussed, I am sure, and as I [35] remember it, the fact that there would be a problem involved in this termination and that I felt that the orders—continuing orders after the termination date would have to be assigned to our company, because I couldn't possibly conceive of how they could continue to make shipments of those orders and give the service that was necessary to be given to handle the problems of possible rejection—rejected material, changes in requirements, changes in technical specifications, and all of the various things that are a continuing part of dealing with the aircraft companies on this type of business. They would be no longer our representative after that date. Therefore, we should properly take care of that responsibility ourselves, as it would be perfectly foolish to have, on one individual order or on two individual orders, to have an aircraft company be forced to deal with two companies on the details of that order.

(Testimony of John M. Storkerson.)

Q. Proceed with your summary of the discussion, please.

A. They asked me what our plans were. I told them, one, that we intended to open our own office in Los Angeles. I told them further that we—upon being asked what we were going to do with the territory north of the normal Los Angeles territory, I told them I didn't know; that we hadn't yet made plans for it.

I was asked whether we had in mind to consider them to continue in that area. I told them in essence that we had no [36] plans for it; that I would be perfectly willing to consider it; but I was there for the purpose of handling the termination.

I don't remember just how the discussion went after that, except that it developed this fact: That we were—well, let me put it this way: As I recall, we carried the conversation along that line, and I was very explicit, not only once but a number of times, and I absolutely would not discuss the matter of extending or negotiating a new contract and tie that in any way to the termination. I wanted to get the termination settled first on an orderly basis, and I told them that I would discuss with my company the possibility of negotiating a future contract with them for the Northern Territory.

Q. You mean you separated the question of their profit from orders for later delivery on the question of their continued representation under a new contract?

A. I did.

Q. In the Northern Territory?

(Testimony of John M. Storkerson.)

A. I did. And at that time, to the best of my recollection, it was not questioned.

Mr. Christin: What is that?

(The Reporter read the answer.)

The Witness: Now about that stage—of course this conversation goes over a two-day period. [37]

Q. (By Mr. Doyle): In San Francisco?

A. In San Francisco.

Q. With both Fred and Ray Montgomery present throughout?

A. With both of them present practically all of the time. There were occasions when I would talk to one or the other while one of them was out on his individual business in the office, so I am not sure that they were both present at all times.

At the end of the first day, if my memory is correct, I told them that I would discuss with my company the potentialities—well, I don't remember exactly how this happened, but I do remember very definitely that it came to a point where I was excused from their office because they wished to talk together, and they very kindly delegated a Mr. Conant to take me out driving around the city for a few hours while they discussed the matter.

Upon my return—I remember again returning to the office of Montgomery Brothers, and, as I recall, it was Mr. Fred Montgomery, sat behind his desk with a series of items on which he, in effect, asked me, "What do you think of this as a basis for our agreement on the termination?"

Those items, as I recall, were taken by him with

(Testimony of John M. Storkerson.)

reference to a piece of paper while he talked to me. At the conclusion of that and the discussion of that, I said I was perfectly willing to recommend such a settlement to my company [38] and agreed to get in touch with the people at Ashland.

I furthermore said that I would consider—that is the maximum commitment given at that time—the potentialities of negotiating with them a future contract for the Northern Territory. That led up to the question of what we were going to do on the basis of our probable acceptance of the termination terms, and I suggested to Mr. Ray Montgomery that the best way to handle it I thought would be for he and I together to visit the various aircraft companies who were the principal accounts, particularly in the Los Angeles territory, and announce to them a cessation, the effort being that while we knew that eventually and as soon as possible that—and we discussed this—that assignments would have to be made in that area for that to be handled properly, we did not wish to involve customers who really had nothing to do with the business between Fenwal and Montgomery Brothers. So it was agreed that we would proceed on that basis.

Q. Go ahead. What happened next?

A. I went back to the hotel.

Q. You don't need to give the details of it, just an outline.

A. I called our plant and secured their agreement in principle on the various points which I

(Testimony of John M. Storkerson.)

had, as I recall, taken down as I discussed them with Mr. Montgomery on the preliminary settlement. And I made arrangements to go down the following day to Los Angeles, where I met Mr. Montgomery.

Q. Which Mr. Montgomery? [39]

A. Mr. Ray Montgomery on the Thursday of that week, which was the 27th, I believe.

Q. What are you referring to there?

A. I am referring to merely a little sketch or calendar, which gives the calendar date.

Q. Your itinerary of that trip?

A. It is briefer than that; it is just a note to show dates.

Q. Very well.

Mr. Christin: Nothing there is a memorandum of a conversation, is there, counsel?

Mr. Doyle: Not so far as I know. You can look at it.

Mr. Christin: If it is dates I don't care; it is all right.

The Witness: So that that would be on the 27th—morning of the 27th—I met Mr. Ray Montgomery for the purpose of straightening out affairs with various aircraft companies in Los Angeles. We went to his office in Los Angeles while we had considerable discussion as to what the plan——

Mr. Christin: May we have the foundation, please? Who was present?

A. Mr. Ray Montgomery was present; Mr. Hawkins was present.

(Testimony of John M. Storkerson.)

Mr. Doyle: Who is Mr. Hawkins?

A. An employee of Montgomery Brothers.

Q. Who else?

A. A Mr. Tompkins. No; wait a minute; it was some of the [40] office personnel of Montgomery Brothers Company; I can't remember exactly who they were, that were in and out of the office from time to time.

Q. Very well.

A. During that morning we worked out the plan as to where we would go, which companies we would go and see, which ones we would go to first, and we proceeded. At the same time there was a running discussion with regard to potential future relations. Having in the interim talked to my company, I told them—Mr. Ray Montgomery—that the termination being agreeable to us, that I would proceed with the negotiations for a contract but, again, I kept them distinct and separate. I merely reported to him that we were interested in the proposal.

So we proceeded to the various aircraft companies throughout the area. They being the accounts of Mr. Ray Montgomery, I felt it was his greater responsibility to open the discussions with them, which he did, and to each one we told them in essence that——

Mr. Christin: If your Honor please, I think the conversation should be given. This is rather important—"in essence."

Mr. Doyle: You can bring it out on cross-ex-

(Testimony of John M. Storkerson.)

amination, Mr. Christin. All I want is a summary of the discussion.

Mr. Christin: As I understand the rules of evidence, they can state what was said there, but cannot draw conclusions as to what is usual and things of that kind. I think we [41] are entitled to that on direct.

The Court: Overruled.

Q. (By Mr. Doyle): State what was done, Mr. Storkerson, if you will.

A. Well, Mr. Ray Montgomery would usually do the principal talking; I can't tell you exactly what his words were, but I know that he said to the individual companies that they were going to cease representing Fenwal in the area on March 1st and that Fenwal would be operating directly with the aircraft companies; that we would get in touch with them at a later date. He thanked them for the business they had given them. He told them that he hoped to be able to continue on in the northern territory representing our company. He told them that we were in agreement; that this termination should take place—I mean this transfer, in Los Angeles; that, therefore, we went to all of the aircraft companies, which took a period of several days, which, as I have it here, would be the 27th, 28th, and possibly on the 29th. I think it was principally the 27th and 28th.

Then on Sunday, which was the 31st of January, then I was asked to meet Mr. Ray Montgomery at his hotel, to meet him on Sunday morning at the

(Testimony of John M. Storkerson.)

hotel in Los Angeles for a conference, which I did.

We had breakfast together, went up to his room and talked. At that time Mr. Montgomery proceeded to—— [42]

Mr. Christin: May I have the foundation of who was present?

A. Myself, Mr. Ray Montgomery and Mr. Hawkins.

Q. (By Mr. Doyle): Anyone else?

A. No, not that I remember.

Q. Go ahead.

A. During that conversation Mr. Ray Montgomery was asking me for a number of concessions to be made in addition to the agreement which I understood we had already reached. I had already——

Mr. Christin: I think that last part should go out, "which I thought we had already reached."

The Court: Motion denied.

The Witness: I recall among those concessions that I had already previously told him that we would, under no circumstances entertain the idea of renewing any contract with Montgomery Brothers which would be set up on the basis of the one we had just cancelled; if any new contract were to be considered it would have to be on the basis—the same basis as granted to all our other representatives located all throughout the country.

I also made a specific exception that I would not permit the Boeing Aircraft Company in Seattle to be handled; that was to be a definite exclusion;

(Testimony of John M. Storkerson.)

and I told him that the reason was that we wished to deal directly with Boeing.

The Court: Is this a patented article? [43]

A. Yes, sir, it is.

Q. Do you have competition?

A. Yes, we have competition. The competition isn't identical either in its concept or the method of approach. They try to meet the same problem from a different point of view.

Q. When was it patented?

A. It was patented—there were a lot of different patents. The original patent, I think goes——

Q. When did you people take hold of it?

A. When did we take over?

Q. Yes, your people.

A. One of our Company invented it.

Q. During the last war?

A. After that; it was—I can't tell exactly; it must have been in the late '20's.

The Court: You are speaking of the first war. Go ahead, Mr. Doyle.

Q. (By Mr. Doyle): Proceed, please, Mr. Storkerson.

A. At the same time I had said that we would expect him to use the same—exactly the same discount arrangement that we used with other representatives. Now those two points were among the points which were in contention at that Sunday morning meeting. And at that time I told Mr. Montgomery that I felt that he had changed his position; that he wasn't acting in accordance with

(Testimony of John M. Storkerson.)

the agreement reached in San Francisco, and [44] that I didn't intend to keep on providing additional concessions; that I was still standing on the agreement as we reached it in San Francisco. Then he made an effort to couple—he asked me—he told me that he would give us the termination agreement after he had seen the proposed contract for the north.

Q. What do you mean, give you the termination agreement? A. That he would——

Q. The agreement had been terminated, as I understood.

A. No; he would give his written confirmation of the San Francisco arrangements.

Q. You mean about commissions on orders, or profit on orders after the 60 days?

A. Yes.

Mr. Christin: I object to this leading at this particular time.

Mr. Doyle: It is stipulated it is a leading question. I was confused by his testimony.

Mr. Christin: I move that it go out.

The Witness: In any event, what we argued about was the fact that I still felt that they should sign a letter which was forthcoming from our company outlining the terms exactly as I had received them and discussed them in San Francisco and that should be acknowledged immediately and we would—entirely separate from that, I was prepared in good faith to go back [45] and start work on the

(Testimony of John M. Storkerson.)

issuance of or the negotiation of a new contract with them.

Then I was asked how soon I could get the papers out, and I said that a letter would be forthcoming from our company with regard to the San Francisco agreement immediately; that the new contract that he was so concerned about, that I would immediately upon my return home set to work on it, and suggested to him that I would get in touch with him regarding that negotiation not later than approximately 10 days.

The Court: If you cut Boeing out of it what would be included in the new contract outside of Southern California?

A. If you cut Boeing out of the area north of the Los Angeles territory, it would leave their industrial accounts in this whole area.

The Court: That is the important part of it; it would leave no aircraft business?

A. It would leave no aircraft business; that's right.

The Court: There are different types of business?

A. They are different types of business.

Q. (By Mr. Doyle): Go ahead, Mr. Storkerson.

A. So I—that finished the negotiation with Mr. Ray Montgomery on the Sunday and I returned home——

Q. Was there any other discussion—pardon?

A. And I returned home very shortly thereafter.

(Testimony of John M. Storkerson.)

Q. When you returned to Boston or to Ashland, did you send [46] forward to Montgomery Brothers your version of the arrangement reached at San Francisco?

A. It had gone forward before I actually arrived home, because I had transmitted it completely by telephone to Dr. Walter.

Q. And had he sent a letter to Montgomery Brothers embodying your telephone conversation with him? A. He had.

Mr. Doyle: Do you have the letter of February 4, 1949, please?

Mr. Christin: I don't seem to have the original here.

Mr. Doyle: May I use a copy?

Mr. Christin: I have one here you can use.

Q. (By Mr. Doyle): I have received from defendants' counsel and show you what purports to be a copy of a two-page letter dated February 4, 1949, addressed to Messrs. Fred and Ray Montgomery, Montgomery Brothers, San Francisco, and concluding Fenwal, Incorporated, by Carl W. Walter, President. Subject to check as to the comparison of this copy with our record of the original, is that the letter to which you refer?

A. That is right.

Mr. Doyle: I offer this copy as Plaintiff's Exhibit 9, with the stipulation if you please, Mr. Christin, that it may be compared with our copy of the original.

Mr. Christin: Oh, yes, certainly.

(Testimony of John M. Storkerson.)

Mr. Doyle: And any discrepancies corrected accordingly. [47]

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(Copy of letter dated February 4, 1949, Fenwal to Montgomery, marked Plaintiff's Exhibit No. 9 in evidence.)

PLAINTIFF'S EXHIBIT No. 9

February 4, 1949

Special Delivery—Air Mail

Messrs. Fred & Ray Montgomery

Montgomery Brothers

1122 Howard Street

San Francisco 3, California

Dear Fred & Ray:

In confirmation of the negotiation between your company, and our Mr. J. M. Storkerson, relative to the termination of our sales agreement, the termination being effective March 1, 1949; we wish to outline for your confirmation the following points of agreement which establish the basis for handling the mechanics of cancellation.

- 1.0 All orders for Fenwal products, from the territory of Montgomery Brothers, which are dated prior to January 3, 1949, and regardless of the shipping schedule on the order, are to be handled by both Fenwal, Incorporated, and

(Testimony of John M. Storkerson.)

Montgomery Brothers, under the discount terms of the cancelled sales agreement.

2.0 All orders for Fenwal products, from the territory of Montgomery Brothers, which are dated later than January 2, 1949, but before March 1, 1949, shall be handled in the following manner:

2.1 All shipments made before March 1, 1949, shall be handled as outlined in 1.0, above.

2.2 All shipments made March 1, 1949, and after, shall be handled as follows:

2.2.1 Montgomery Brothers shall request permission of the customer to assign the orders to Fenwal and, if permission is given, shall assign such order to Fenwal at once.

2.2.2 Fenwal shall bill all assigned orders and pay Montgomery Brothers as commission, an amount equal to 50% of the amount they would have earned had the orders not been so assigned and had the territory contract not been cancelled.

2.2.3 In order to eliminate delays, prior to order assignment, Fenwal shall ship against Montgomery Brothers' orders at a price which will provide Montgomery Brothers with the same earning as in 2.2.2, above.

(Testimony of John M. Storkerson.)

3.0 The total amount of business under 2.0 shall not exceed \$80,000.00.

4.0 It is understood that orders under this agreement represent the requirements for certain contract production applications. We realize that there may be changes in the types of Thermoswitches, or modifications in application, which will require changes in customer's requirements and contracts. All such changes, wherever possible, shall be requested as changes in the customer's original contract. In any event, even if a new order is required, Montgomery Brothers shall receive as discount, or commission, the same percentage on units shipped that they would have received on the original order, up to the number of units on the original order.

5.0 If this letter is acceptable to you, please sign the enclosed copy and return it to us.

Very truly yours,

FENWAL INCORPORATED.

By CARL W. WALTER,
President.

MM

Encl.

(Testimony of John M. Storkerson.)

San Francisco, California

February . . , 1949

Fenwal Incorporated
Ashland, Massachusetts

Gentlemen:

The foregoing letter correctly states our agreement.

Very truly yours,

MONTGOMERY BROTHERS.

By

[Stamped]: Received February 7, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: And with the understanding if counsel should discover the original letter in the course of the trial, it may be substituted.

Mr. Christin: I think I have it in another file, Mr. Doyle.

Mr. Doyle: You referred, Mr. Storkerson, to your statement to Mr. Ray Montgomery that you would send on proposed contracts for the northern territory after you returned to Massachusetts. Did you do so? A. I did.

Mr. Doyle: Do you have the letter of February 9, 1949, from Mr. Storkerson to Montgomery Brothers, with the attached contract?

(Testimony of John M. Storkerson.)

(Mr. Christin handed a document to Mr. Doyle.)

Q. (By Mr. Doyle): I hand you a letter on the letterhead of Fenwal, Incorporated, one page, dated February 9, 1949, addressed to Mr. Ray Montgomery, San Francisco, and signed "J. M. Storkerson, General Manager." Did you send that letter to Mr. Montgomery on or about its date?

A. I did.

Q. Did you enclose with the letter the three-page blank draft [48] of contract that I now exhibit to you?

A. I did. That appears to be the contract.

Mr. Doyle: I offer the two documents as a single exhibit, Plaintiff's Exhibit 10.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 10 in evidence.

(Letter dated February 9, 1949, Fenwal to Montgomery, and draft of contract, marked Plaintiff's Exhibit No. 10 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 10

Fenwal
Ashland, Massachusetts
Fenwal Incorporated

Air Mail—Registered—RRR

February 9, 1949

Mr. Ray Montgomery
Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Dear Ray:

I am sending herewith two copies of the Fenwal Sales Agreement for your signature and return to us for our signature and completion of the contract—one copy of which will promptly be returned to you. This contract as I have told you is in the same form as that offered to other sales representatives with the exception of the several items you have discussed and which are modified in your favor in recognition of problems peculiar to the West Coast area.

I believe with this action and the letter you have already received from Dr. Walter that I have properly executed all the commitments which I have made to you during recent weeks. On receipt of this letter, we would appreciate your acknowledgment and acceptance by wire of Dr. Walter's letter of February 4, 1949, and confirmation by mail. You will observe that Dr. Walter's letter contains all

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

of the essential points you outlined to me in San Francisco as your basis for a fair termination of the old agreement.

You will agree with me that a prompt conclusion of these matters is in the interest of both of us and I ask that you advise us next week of the acceptance of the new arrangements.

Respectfully yours,

FENWAL INCORPORATED,

/s/ J. M. STORKERSON,

General Manager.

JMS:MM

Encls.

[Stamped]: Received Feb. 14, 1949, Montgomery Bros.

Agreement Dated February 14, 1949, at Ashland, Massachusetts, in the County of Middlesex and State of Massachusetts, between Fenwal Incorporated, a Massachusetts corporation, with its principal place of business and general office in Ashland, Massachusetts (hereinafter called the Manufacturer), and Montgomery Brothers, San Francisco, California (hereinafter called the Sales Representative).

Witnesseth:

Whereas, the Manufacturer produces and distributes Fenwal Thermoswitches and the Sales Rep-

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

representative desires an appointment as Sales Representative to solicit orders for the above-named Manufacturer.

Now, Therefore, for and in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

Art. 1. Exclusive franchise of territory is granted to the Sales Representative as follows:

The State of California lying north of the counties of San Luis Obispo, Kern, and San Bernardino, and the States of Washington, Oregon, Idaho, Western Montana, Nevada, Utah and the Territory of Alaska.

Art. 2. The Manufacturer grants the Sales Representative the right to solicit orders for the products listed in the Manufacturer's regular price list, and for other products made available by the Manufacturer for sale through the Sales Representative, subject to the rules of such solicitation in paragraphs six and seven.

Art. 3. The Sales Representative shall use its best efforts to solicit orders for the Manufacturer's products and agrees to pay its own traveling and other expenses and not to incur any expense in the name of the Manufacturer.

Art. 4. No order shall be accepted by the Sales Representative except upon the express condition that it is subject to acceptance by the Manufacturer at its head office in Ashland, Massachusetts. All

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

sales by the Sales Representative shall be at prices contained in the price list supplied by the Manufacturer. It is expressly understood that no device or arrangement shall be entered into by the Sales Representative with any customer which shall in any way result in sales below the scheduled prices as supplied by the Manufacturer from time to time.

Art. 5. All invoices for products sold by the Sales Representative shall be sent out by the Manufacturer to the customer.

Art. 6. Products shall be sold f.o.b. Ashland, Massachusetts. Commissions will be paid on the net f.o.b. prices of standard catalog products at Ashland, Massachusetts, in accordance with the varying schedule of discounts granted to individual customers as follows:

Customer's Discount	Sales Representative's Commission
10%	25 %
20%	22½ %
30%	20 %
35%	17½ %
40%	15 %
45%	12½ %
50%	10 %

Commissions to the Sales Representative will be credited by the Manufacturer to the Sales Representative's commission account immediately upon

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

shipment of the respective invoices on which commission is due, and on the 15th day of each calendar month the Manufacturer will pay the Sales Representative the amount of commissions due as of the last day of the preceding month. The decision of the Manufacturer on any questions as to the origin of sales and disposition of the Sales Representative's commission is to be conclusive and final.

Art. 6A. On orders by the Sales Representative which are accepted by the Manufacturer for the purchase by the Sales Representative of Thermo-switches which are for resale in its territory and are listed in the Manufacturer's price list, the Sales Representative shall receive a discount of 50% and 10% computed upon list prices with established discounts, shipped f.o.b. Ashland, Massachusetts. The Sales Representative shall be allowed to charge his customers the transportation charges from Ashland, Massachusetts, providing they do not exceed 5% of the Manufacturer's net list prices, f.o.b. Ashland, Massachusetts.

Art. 6B. On the sale at net prices to customers in the Sales Representative's territory of special Thermoswitches or other special items, whether or not in the Manufacturer's catalog, the Sales Representative is to be allowed a commission of 15% of the net price.

Art. 6C. If and when any special Thermoswitch

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

or other item referred to in 6B is made a standard catalog item so that its price is changed from net to list, the commission or discount shall be the same as is provided for in Art. 6 or 6A.

Art. 7. Commission paid on accounts that default payment will be debited to the Sales Representative's commission account.

Art. 8. The relationship of the parties to this contract is not that of employer and employee, and nothing herein shall be construed as creating such relationship between the Manufacturer and the Sales Representative.

Art. 9. This agreement shall continue in force until terminated by either party, but may be terminated by either party giving notice by mail addressed to the last known address of the other party of its or his decision that the contract shall terminate on a date at least thirty (30) days after the date of mailing the notice. As to orders obtained by the Sales Representative and accepted by the Manufacturer at any time before the termination of this agreement, commissions will be paid only upon goods ordered to be delivered on or before the date of termination. No commission is to be paid with respect to any other goods covered by such orders. At the termination of this contract, the Sales Representative agrees to return to the Manufacturer all samples, papers, price lists, or belongings of the Manufacturer which may be in

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

the possession of the Sales Representative at that time.

Art. 10. This contract was made and executed in the State of Massachusetts and is to be construed and interpreted under the laws of that State.

In Witness Whereof, the Manufacturer has caused this agreement to be executed in its name by its duly authorized officers, and the Sales Representative has hereunto set his hand the day and year first above written.

Attest:

FENWAL INCORPORATED,

By

J. M. Storkerson, General
Manager.

MONTGOMERY BROTHERS,

By

Witness:

.....

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Was there a reply to those communications? A. There was.

Q. I show you a letter on the letterhead of Montgomery Brothers dated February 14, 1949, ad-

(Testimony of John M. Storkerson.)

dressed to Mr. John Storkerson, Fenwal, Incorporated, signed Montgomery Brothers by W. Ray Montgomery, and ask you if you received that reply to your communications of February 4th and February 9th? A. I did.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit next in order, 11.

The Court: Admitted.

The Clerk: Plaintiff's 11.

(Letter February 14, 1949, Montgomery to Fenwal, marked "Plaintiff's Exhibit No. 11" in evidence.)

PLAINTIFF'S EXHIBIT No. 11

Inter-office Correspondence

From

Montgomery Brothers
San Francisco 3

February 14, 1949

To: Fenwal Incorporated.

Subject: General.

Attn: Mr. John Storkerson

Dear John:

This will acknowledge receipt of your letter of February 4, 1949, as well as your letter of February 9, 1949, containing a proposed new Sales Agreement.

Without in any way receding from the position outlined in our letter of January 7, 1949, and

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

purely by way of compromise, we are willing to accept the proposal outlined in your letter of February 4, 1949, and the Sales Agreement dated February 14, 1949, with the following modifications if they prove agreeable to you, otherwise, we are obligated to stand upon our original position.

1.0 Satisfactory.

2.0 All orders for Fenwal products from the territory of Montgomery Brothers which are dated after January 2, 1949, but before March 1, 1949, shall be handled in the following manner:

2.1 All orders dated before March 1, 1949, for shipment into Montgomery Brothers' territory other than the Los Angeles area or Southern California territory shall be handled as outlined in 1.0 above, except with revised discounts.

2.2 On all orders dated January 2, 1949, to March 1, 1949, for shipment after March 1, 1949, into Los Angeles area or Southern California territory, Montgomery Brothers are to receive an amount equal to 50% of the amount they would have earned had the original Sales Agreement not been terminated.

2.2.1 On all orders where shipments are to be made after March 1, 1949, into the Los Angeles area or Southern California territory, Montgomery Brothers are to re-

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

quest permission of the customer to assign the orders to Fenwal Incorporated, and if permission is given, shall assign such orders to Fenwal Incorporated at once.

2.2.2 Satisfactory.

2.2.3 Satisfactory.

3.0 Eliminate.

4.0 Satisfactory.

Sales Agreement dated February 14, 1949, at Ashland, Massachusetts, satisfactory with the following exceptions:

Art. 4. All orders presented by Montgomery Brothers up to and including the expiration date of this Agreement for standard Thermoswitches and for all special Thermoswitches that have heretofore been used for the same or similar application and proven satisfactory, are to be accepted by the Manufacturer and shipments are to be made as specified on the order, regardless of release dates. All sales by said Representative shall be at prices furnished by the Manufacturer. It is expressly understood that no device or arrangement shall be entered into by the Sales Representative with any customer which shall in any way result in sales below the scheduled prices as supplied by the Manufacturer from time to time.

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

Art. 5. Eliminate.

Art. 6. Products shall be sold f.o.b. Ashland, Massachusetts. If for any reason customers in the Sales Representative's territory desire to purchase direct from the Manufacturer, then commissions will be paid on the net f.o.b. prices of standard catalog products at Ashland, Massachusetts, in accordance with the varying schedule of discounts granted to individual customers as follows:

(Balance of Art. 6 satisfactory.)

Art. 6A. On orders placed by the Sales Representative for resale in their territory that are listed in the Manufacturer's price list, the Sales Representative shall receive a discount of 50/10% computed upon the list prices with the established discounts, shipped f.o.b. Ashland, Massachusetts. The Sales Representative shall be allowed to charge his customer the transportation charges from Ashland, Massachusetts, provided they do not exceed 5% of the Manufacturer's net list price f.o.b. Ashland, Massachusetts.

Art. 6B. On the sale at net prices to customers in Sales Representative's territory of special Thermoswitches or other special items which are not in the Manufacturer's catalog, the Sales Representative is to purchase same on a basis of net price established by the Manufacturer less a dis-

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

count to the Sales Representative of 15% of the net prices f.o.b. Ashland, Massachusetts.

Add—

Art. 6D. On the sale at net prices to the Boeing Airplane Company on Special Thermoswitches or other items, whether or not in the Manufacturer's catalog, the orders are to be taken in the name of the Manufacturer and the Sales Representative is to receive a commission of 15% payable as provided for in Art. 6.

Art. 9. This agreement shall continue in force for a period of one year from date, with the understanding that 60 days prior to termination, notice shall be given to Sales Representative that the Agreement can be renewed on the same terms for a like period, or, a new Agreement can be negotiated by the parties hereto that will be mutually satisfactory. If, however, the contract is terminated, it is understood that all orders placed with the Manufacturer by the Sales Representative prior to the termination date, for standard Thermoswitches and for all special Thermoswitches and other items that have heretofore been used in the same or similar application and proven satisfactory, are to be accepted and shipped, regardless of shipping schedule appearing on the order.

I sincerely hope that these suggested changes will be acceptable so that we can continue our pleasant

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

business association, for I know that it can be made mutually profitable.

Yours very truly,

MONTGOMERY BROTHERS,

/s/ W. RAY MONTGOMERY.

WRM:da

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): I direct your attention, Mr. Storkerson, to the fact that this three-page communication bears the date on [49] the first page February 14, and on the two succeeding pages in the upper right hand corner, February 15. Did that dating appear on it when you received it?

A. It did.

Q. I also direct your attention to a red stamp, "Feb. 21, 1949," and ask you if you know when that stamp was placed upon the communication?

A. That stamp appears to be the stamp we normally use on all incoming mail as received.

Q. So you would say it was received in your office on February 21, 1949? A. Correct.

Q. I direct your attention to another letter dated February 16, 1949, from Montgomery Brothers addressed to Fenwal, attention Mr. J. M. Storkerson, and ask you if you received that letter in the regular course? A. I did.

(Testimony of John M. Storkerson.)

Q. Again directing your attention to the stamp "Feb. 21, 1949," do you identify it?

A. As the same type of stamp as the other one.

Q. Does that mean that that communication was received in your office upon the same date as the prior communication? A. Yes, it does.

Q. I direct your attention on the first line of this letter to the fact that the date February 15th has been encircled [50] and "14" placed in lieu thereof. Did you do that?

A. I couldn't be sure.

Q. The reference apparently is to the Montgomery letter of the 15th—

A. That is right.

Q. —or of the 14th, bearing the date "14" on the first page, and the 15th on each of the two succeeding pages? A. That is right.

Mr. Doyle: I offer the document as Plaintiff's exhibit 12.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 12.

(Letter dated Feb. 16, 1949, Montgomery to Fenwal, marked Plaintiff's Exhibit No. 12, in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 12

Inter-office Correspondence

From

Montgomery Brothers
San Francisco 3

Airmail

February 16, 1949

To: Fenwal Incorporated.

Subject: General.

Attn: Mr. J. M. Storkerson

Dear John:

14th

On reading Ray's letter of February 15th, I think that paragraph under 2.1 can be clarified, and I suggest that you substitute the following, marked 2.1, for the same paragraph in Ray's letter of February 15th:

2.1 On all orders dated January 2, 1949, to March 1, 1949, and shipped into Montgomery Brothers' territory prior to March 1, 1949, shall be handled as outlined in 1.0 above. All orders shipped after March 1, 1949, will be handled as outlined in new Sales Agreement dated February 14, 1949, or later.

Ray was in such a hurry to get away that I am sure if he had carefully considered this paragraph under discussion he would have made the change prior to the letter going out.

(Testimony of John M. Storkerson.)

We are looking forward to receiving a new Sales Agreement embodying the changes that we have suggested, and can assure you that we will not curtail any of our efforts in promoting the sale of Fenwal equipment on the Pacific Coast.

With kindest regards from the writer, we remain

Yours very truly,

MONTGOMERY BROTHERS,

/s/ F. H. MONTGOMERY.

FHM:da

cc reg. mail

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Were there any oral communications between you on the one hand and either of the Montgomery Brothers on the other at or about the time of the two communications in writing that you have just identified?

A. During that period—exactly when, I can't remember—there were one, probably two or more telephone discussions with the Montgomery Brothers.

Q. What was the subject matter of those conversations as best you recollect them?

A. Well, the principal thing I remember is a rather prolonged discussion relating to— [51]

Mr. Christin: May I ask who was the conversation with?

(Testimony of John M. Storkerson.)

A. I don't remember; either Mr. Ray or Mr. Fred Montgomery, but one of them.

Q. And about the date?

A. Some time around the 9th to the 15th; in that general area; I can't remember.

Q. Of February? A. Right.

Q: (By Mr. Doyle): Was there more than one conversation?

A. As I remember it, there were—there was more.

Q. How many? A. I don't know.

Q. State the substance and purport of them as best you recollect them.

A. The substance was that—the main part of that discussion related to our shipments to Montgomery Brothers where a very strong plea was made to me to make as many shipments as I possibly could immediately and keep them sustained through the 60 day period. And there was some discussion in which the amounts having been shipped were discussed, and I endeavored to give estimates of how much we would have out. And I told them that I was doing everything that I possibly could within our factory to get those shipments out as rapidly and expeditiously as possible. That is all I remember of the substance of [52] them.

Q. Upon receipt of the Montgomery Brothers letters of February 14th or 15th and of February 16th, received by you on February 21, 1949, what action was taken by you at that time?

(Testimony of John M. Storkerson.)

A. Well, I was at work analyzing the letters when I found out that we hadn't received payment on our invoices for January shipments, so that actually I didn't take any further action beyond studying their letters and so forth.

Q. What was the amount of invoices that you were told was unpaid? A. The amount?

Q. Approximately; I won't hold you to the exact figure at this time.

A. Somewheres around twenty thousand.

Q. For January shipments, twenty thousand?

A. Well, twenty to thirty; somewheres in that range. I would have to refer to my records to get it exactly.

Q. Yes. We will get the figure. Then did you communicate with Montgomery Brothers about that fact?

A. I didn't personally. Our Mr. Drew, Controller, wired them to determine whether their check had been sent.

Q. I have obtained from Defendants' counsel and show you herewith, telegram dated February 21, 1949, addressed to Montgomery Brothers, San Francisco, and signed Fenwal, Inc., A. C. Drew, and ask you if that is the communication to which you have referred? [53] A. It is.

Q. Would you read the wire, please.

A. "January check not received. Please advise whether sent. Fenwal, Inc., A. C. Drew."

Mr. Doyle: I offer this document as Plaintiff's Exhibit 13.

(Testimony of John M. Storkerson.)

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 13 in evidence.

(Telegram dated February 21, 1949, Fenwal to Montgomery, marked Plaintiff's Exhibit 13 in evidence.)

PLAINTIFF'S EXHIBIT No. 13

Western Union

[Telegram]

Feb. 21, 1949. 11:55 a.m.

SFAB086 PD-WUX. Ashland, Mass. 21 237P

Montgomery Bros., Attn. Mrs. R. J. Roche

1122 Howard St—

January Check Not received. Please Advise
Whether Sent.

FENWAL Inc.

A. C. DREW

[Stamped]: Received February 21, 1949. Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): You have testified about the course of conduct regarding payments, and I exhibited to you and you identified and there is in evidence a form of acceptance. I neglected however, to exhibit to you a form of invoice in use between these parties.

I show you a blank form of invoice headed "Fen-

(Testimony of John M. Storkerson.)

wal, Inc.," and ask you if you identify that as the form of invoice customarily in use between you and Montgomery Brothers on shipments made pursuant to their orders and your acceptances?

A. I do.

Q. And directing your attention thereto, as on the acceptance form, "Terms one-half per cent 10—net 30.—F.O.B. Ashland," was that amount changed from 1 per cent to one-half of 1 per cent on or about January 1, 1948, as in the case of the acceptance form? [54]

A. Yes.

Mr. Doyle: I offer the identified document as Plaintiff's Exhibit 14.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 14 in evidence.

(Invoice form marked Plaintiff's Exhibit No. 14 in evidence.)

ORIGINAL INVOICE

REG. U. S. PAT. OFF.

**CUSTOMER'S
ORDER NO.**

OUR ORDER
NUMBER

APPROX.
SHIP. DATE

SHIP VIA

Ashland, Massachusetts, U. S. A.

SHIP TO-

SOLD TO -

INVOICE NUMBER

INVOICE DATA

PACKING SLP NUMBER

DATE SHIPPED

HOW SHIPPED

NET WT.

GROSS·WT.

Box Dim.

EXPORT LIC.

IMPORT LIC.

METHOD OF PAYMENT

TERMS: 1/2% 10 — NET 30 — F. O. B. ASHLAND. INTEREST CHARGED AFTER 30 DAYS

QUANTITY ORDERED	CATALOG NUMBER	SPECIFICATIONS	UNIT PRICE	BALANCE AFTER THIS SHIPMENT	QUANTITY SHIPPED	EXTENSION
						1
						2
						3
						4
						5
						6
						7

Q. (By Mr. Doyle): Was this custom or practice to which you have testified respecting payments on the 10th of the month evidenced by any written communications of which you are aware?

A. It was.

Mr. Christin: We will object to the form of the question as calling for the opinion and conclusion of the witness. We have no objection to the document going in. The Court can determine what that means.

The Court: He has already answered that it was.

Mr. Christin: I move to strike it out.

The Court: Denied.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a letter dated May 20, 1947, on the letterhead of Montgomery Brothers, addressed to Fenwal, Inc., and signed "Montgomery Brothers, R. J. Roche," and ask you if you identify that as a communication respecting payment on the 10th of the month? A. I do. [55]

Mr. Christin: Your Honor, that part of it we object to—"respecting payment."

Q. (By Mr. Doyle): Do you identify the communication as having been received in the ordinary course of business? A. I do.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 15 and request the Clerk to mark it accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Testimony of John M. Storkerson.)

(Letter May 20, 1947, Montgomery to Fenwal, marked Plaintiff's Exhibit 15 in evidence.)

PLAINTIFF'S EXHIBIT No. 15

Inter-Office Correspondence

May 20, 1947

From

Montgomery Brothers
San Francisco 3

To: Fenawl, Inc.

Subject: Account

Attention: Mr. A. C. Drew, Comptroller

Dear Mr. Drew:

We are attaching hereto our check covering April invoices in the amount of \$10,184.92. Also, replying to your letter of May 16th, we are attaching hereto copies of our remittance advice covering our payment of \$19,190.24.

At the time we sent you our check, we attached copies showing what our payment covered. However, same must have been detached before this reached your desk.

Regarding the second paragraph of your letter of May 16th, we are adding the \$17.10 to our remittance of today.

From the copies of your statements, which we are attaching, covering our payment of \$19,190.24, from which we took 1% cash discount that you are ob-

(Testimony of John M. Storkerson.)

jecting to, if you will refer to these statements you will see that on December 31 you owed us \$22,-687.79, in January you owed us \$16,183.98, and in February you owed us \$13,371.62.

We wrote you on January 16th asking that you please send us a check in order to balance the account, as we needed the money at that time to pay taxes, etc. However, according to Mr. Robinson's letter, you were not in a position to do so. Therefore, we were obliged to let this account stand, and we feel perfectly justified now in taking the discount of \$191.90.

We religiously pay all our accounts on the 10th of the month. If we could get your invoices rendered correctly with the correct discount, and also if we could get a statement from you each month by the 10th of the month, we would have your check in the mail every month on the night of the 10th. For instance, the last statement we received from you was for January, February and March. This was not sent us until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statement each month.

We also note in the third paragraph of your letter of May 16th you are questioning some of the deductions we made, as follows:

Invoice #7-481	\$64.75
Invoice #7-523	64.75
Invoice #7-1375	64.75

(Testimony of John M. Storkerson.)

If you will refer to your latest discount schedules on switches in quantities from 1,000 to 2,499, your discount is 50 and 5%. That is the discount which we must give our manufacturers. We as representatives receive an additional 15%. Therefore, your invoices were rendered less 50 and 10%, whereas they should have been less 50-5-15%. There is, therefore, credit due us on these three invoices of \$64.75 each. This also applies to Invoice #7-2358. There is a credit of \$34.75 due us on that, as this applies to the same purchase order.

The following are also corrections made on your invoices, deductions which we have taken, and we should receive your credit memorandum for these amounts:

Invoice #7-1083: The correct price of these switches is \$9.50, and not \$11.00, as you show on your invoice. There is, therefore, a credit due us of \$35.70. We refer you to Mr. E. B. Pierce's letter of February 19th substantiating this price.

Invoice #7-2454	Less 20%	Credit due—\$.06
Invoice #7-2861	Less 20%	Credit due— 26.10
Invoice #7-2862	Less 20%	Credit due— 8.70
Invoice #7-2863	Less 20%	Credit due— 26.10
Invoice #7-2864	Less 20%	Credit due— 26.10
Invoice #7-2961	Less 20%	Credit due— 17.40
Invoice #7-2962	Less 20%	Credit due— 52.20
Invoice #7-2963	Less 20%	Credit due— 52.20
Invoice #7-2964	Less 20%	Credit due— 52.20

(Testimony of John M. Storkerson.)

There is one old item of November 29, 1945, Invoice #5-8379, of which you still show that we owe you \$248.20. This is definitely not correct. If you will refer to the invoice, you will see you have charged us \$9.25 for S-2223 Thermoswitch. In the past two years we have purchased thousands of S-2223 from you, and our price has always been \$8.40, less 20%.

When you rendered this invoice in 1945, you showed a price of \$9.25, less 50 and 10%. Your invoice called for \$1,519.31. It is regrettable that we did not pay your invoice as you rendered it, thereby closing the matter out. However, in our honesty we paid you the invoice in the correct amount of \$8.40 each, less 20%, paying you the amount of \$2,452.80. We would have saved \$933.49 had we not corrected your error. If \$9.25 was the correct price for an S-2223 Thermoswitch, we are wondering why you only allowed us \$8.40 on all the returns that Lockheed made, when we should have gotten credit for \$9.25. Please review your files on this, and delete this old balance of \$248.20 from our account.

With our payment today, we feel that our account is paid in full to May 1st. We also hope that you will see your way clear to send us your statement each month so we can have it by the 10th of the

(Testimony of John M. Storkerson.)

month, and we will see that your check gets in the mail that night.

Very truly yours,

MONTGOMERY BROTHERS,

/s/ R. J. ROCHE.

RJR:is

cc Accounting Dept.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Do you have the original, Mr. Christin, of a letter dated June 13, 1947, from Fenwal, Inc., to Montgomery Brothers in response, I believe, to the letter of May 20, 1947, just introduced in evidence?

Mr. Christin: Just a moment. I don't seem to have it here at this time. You may use a copy.

Mr. Doyle: With your permission, I will use a copy and substitute the original if it is located.

Q. I show you, Mr. Storkerson, a copy of a letter dated June 13, 1947, addressed to Montgomery Brothers and signed Fenwal, Inc., and ask you if that communication was sent in the usual course of business? A. It was.

Mr. Doyle: I request that it be marked as Plaintiff's [56] Exhibit 16 and offer the same in evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Letter dated June 13, 1947, Fenwal to Montgomery, marked Plaintiff's Exhibit 16 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 16

June 13, 1947

Air Mail

Montgomery Brothers

1122 Howard Street

San Francisco 3

California

Attention Miss R. J. Roche

Gentlemen:

I have reviewed the adjustments pending on your account with our Mr. Robinson and the following is the result of our survey.

Invoice 5-8379—Mr. Robinson agrees with you that a \$248.20 credit is due. This will be forwarded shortly.

Debit Memo 264 and 265—These Debit Memos of \$2.27 and \$3.88 respectively, were for the difference in transportation charges between Railway Express and normal transportation. However, we feel that these amounts are due us as your order #3002 specifically stated "Express" and order #2766 did not show any routing and in the absence of specific instructions, we always ship Railway Express. Will you kindly include these amounts in your next remittance?

Invoice 7-2454—We find that the \$.06 deduction by you is in order and we will issue our credit accordingly.

(Testimony of John M. Storkerson.)

Invoice 7-481, 7-523, 7-1375, 7-2358—On each of these remittances you deducted \$64.75, noting that we had rendered them at 50% and 10% discounts whereas they should have been 50%, 5%, and 15%. We find you are correct and will issue our credits to cover same.

Debit Memo 294 and 295—The material covered by these Debit Memos for \$28.48 and \$7.26 has never been received. Will you kindly check as to whether it has been shipped.

Debit Memo 307—We are unable to locate this Debit Memo in the amount of \$4.47. Will you kindly forward a copy of same.

We have not, as yet, received your remittance for May and are wondering if this was sent on the tenth of the month as you had previously stated it would be. We will appreciate your advice.

Very truly yours,

FENWAL INCORPORATED,

A. C. DREW,
Controller

em

cc Mr. C. J. Robinson

Reg. mail

[Endorsed]: Filed July 11, 1950.

(Testimony of John M. Storkerson.)

Mr. Doyle: It is approaching the noon hour, your Honor. I have about two or three of this particular batch. Perhaps it would be convenient to finish those.

Q. I show you, Mr. Storkerson, a letter dated June 20, 1947, on the letterhead of Montgomery Brothers addressed to Fenwal, Incorporated, to which is attached two different Montgomery Brothers debit memorandums and ask you if you identify that communication as received in the usual course of business.

A. I do.

Mr. Christin: There is a notation on the last page there that will not be admitted.

Mr. Doyle: Yes; it may be stipulated, Mr. Christin, that the penciled notes on the credit memorandum need not be regarded as a part of the exhibit.

Mr. Christin: And also on the first page there is some writing at the top of it.

Mr. Doyle: Very well; the pencil writing. However, the date stamp is important.

Mr. Christin: Oh, yes.

Mr. Doyle: Plaintiff's Exhibit 17. I offer it in evidence. [57]

The Court: Plaintiff's Exhibit 17 in evidence.

(Letter dated June 20, 1947, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 17 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 17

Inter-Office Correspondence

From

Montgomery Brothers
San Francisco 3

June 20, 1947

To: Fenwal, Inc.

Subject: Account.

Attention: A. C. Drew, Controller

Dear Mr. Drew:

We wish to thank you for your letter of June 13th, and are very happy to note that we are getting some of the old charges which you have been showing against our account straightened up. We also wish to advise that our check for the May account was mailed you, as promised, on June 10th, in amount of \$42,438.52. We also wish to state that we will continue to send our check promptly on the 10th of the month if you will see that your statement is mailed to us in time for us to check the bills by that time.

Regarding our Debit Memo 264, we are attaching hereto our Credit 341 cancelling this Debit Memo. However, our Debit Memo 265 we regret we are unable to cancel. We requested this by Railway Express. However, you shipped it Air Express, which was not authorized by us or our customer. Therefore we cannot allow this amount. Air Express amounted to \$4.91, and Railway Express on

(Testimony of John M. Storkerson.)

6 pounds would be \$1.03, Therefore we feel that the difference of \$3.88 should be paid by you.

Our Debit Memo 307 was also shipped by Air Express, which should have been shipped Railway Express. This refers to our P. O. 24667, your S-21992, covering shipment of July 31, 1945, to the Lockheed Aircraft Corporation. For your convenience, we are attaching hereto copy which was sent you in May of this year.

Regarding the material returned on Debit Memo 294 and 295, we have contacted our Los Angeles office as to how and when this material was shipped. We will put a tracer on same, and advise you of our findings.

Trusting that you will check into these remaining Debit Memos and be able to issue us credit as requested, we are

Very truly yours,

MONTGOMERY BROTHERS,

/s/ R. J. ROCHE.

RJR:is

cc Accounting Dept.

(Testimony of John M. Storkerson.)

Montgomery Brothers
Engineers - Manufacturers - Chemists
San Francisco, Calif.

July 30, 1946

Customer's Order No. and Date

Requisition No.

Terms: Cash

Date Shipped

Our Register D/M 307

Ship to and Destination Same

Shipped Via

Shipped From

Sold to: Fenwal, Inc., Ashland, Mass.

All accounts subject to sight draft (with exchange) if not paid when due. Interest will be charged on all overdue accounts at the legal rate of interest.

Debit Memorandum

Charging you with difference in transportation
Your inv 5-7051, 4.47.

attached D/M from
Lockheed Aircraft Corp.

(Testimony of John M. Storkerson.)

Montgomery Brothers
Engineers - Manufacturers - Chemists
San Francisco, California

June 19, 1947

Customer's Order No. and Date

Requisition No.

Terms: Cash

Date Shipped

Our Register D/M C/M 341

Ship to and Destination

Shipped Via

Shipped From

Sold to: Fenwal, Inc., Ashland, Mass.

All accounts subject to sight draft (with Exchange)
if not paid when due. Interest will be charged on
all overdue accounts at the legal rate of interest

Credit Memorandum

Cancelling our D/M 264 March 5, 1946. Shipment
on our P. O. 3002. Difference in Rail Express and
Freight, \$2.27.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a letter dated September 11, 1947, on the letterhead of Montgomery Brothers, addressed to Fenwal, Incorporated, and ask you if you identify that document as received in the usual course of business? A. It was.

(Testimony of John M. Storkerson.)

Mr. Christin: Do you offer it?

Mr. Doyle: Yes, I offer the document in evidence as Plaintiff's Exhibit 18.

Mr. Christin: At this time, may it please your Honor, I object to the materiality of this letter and call attention to the other letters; that it was an attempt to change and alter the terms of a written contract.

The Court: I will have to hear you after lunch.

Mr. Christin: Very well.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [58]

Tuesday, July 11, 1950—Afternoon Session

The Clerk: Fenwal, Inc., vs. Montgomery Brothers, on trial.

J. M. STORKERSON

a witness called for Plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

Mr. Christin: If your Honor please, at the time we adjourned I was about to object to the introduction of Exhibit 18, which is a letter. I object to its materiality if this exhibit and the two prior ones, 17 and 16 are introduced for the purpose of varying the terms of a written contract by a subsequent letter. I will object to it on the further grounds

(Testimony of John M. Storkerson.)

that it isn't in the pleadings. The contract of which they allege a breach is predicated on exhibits 1 and 2, and there is no reference in this complaint of a reformation or extension of the terms of the contract other than included in the pleaded documents.

The Court: Do you desire to make a statement before I rule, Mr. Doyle?

Mr. Doyle: Only to say, may it please the Court, that the contract was executed in May, 1944, and all I am doing with these letters is showing the course of conduct under it and the payments made.

The Court: The exhibits are admitted subject to objection. [59]

The Clerk: Exhibit No. 18 in evidence.

(Letter dated September 11, 1947, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 18 in evidence.)

PLAINTIFF'S EXHIBIT No. 18

Inter-Office Correspondence

From

Montgomery Brothers

San Francisco 3

Sept. 11, 1947

To: Fenwal, Inc.

Subject: Account.

Attn.: A. C. Drew, Comptroller.

Dear Mr. Drew:

Yesterday we mailed you our check for \$18,791.31 which, according to our records, paid our account in

(Testimony of John M. Storkerson.)

full to August 31. In order to reconcile this with the statement you sent us, showing we owed you a balance of \$28,887.03, we wish to give you the following information:

Invoice 7-5526—\$67.50. You do not have this charged to us on this statement. However, we included this in our remittance of yesterday.

Invoice 7-5807—\$3.83. Kindly send us a copy of this invoice, as we have no record of receiving same.

Invoice 7-5905—\$6,141.25 and Invoice 7-5906—\$2,348.13. These cover shipments made on September 4th. We received the invoices on September 10th. Undoubtedly it was an error on your part in putting these on our August statement, since they cover September shipments, which of course we will pay in our regular September check.

There is also due us \$759.82 which is in dispute, due to not having received the correct discount from you. We do have T. Hayden letter of September 2nd, wherein you are allowing \$29.75. That leaves a balance of \$730.07, which is made up of the first 11 items on your statement under "Open Deductions."

We have written letters on all these amounts, also we took the matter up with Mr. Robinson and Mr. Turenne while they were in San Francisco, and it was understood at that time that they would discuss the matter with you upon their return, and credits would be forthcoming.

On June 6th you sent us your statement for the

(Testimony of John M. Storkerson.)

month ending May 31st. At that time you told us you could not reconcile our account; that it was out of balance \$5.35, and this amount is shown on your statement of May 31st. However, on your statement of August 31st we notice this amount has now increased to \$7.35. However, as we told you in our letter of June 10th, and we also told Mr. Robinson when he was here, that we have no record of any amount like this being due you. Trust that you will check into this further and please delete this from our account before it really amounts to something, as it seems to be going up.

You also show an open credit of \$5.84, which amount does not belong to us. In your letter of June 6th you called this to our attention, and you said that would be taken off our statement. However, we notice you are still carrying this credit on our account. The difference between the \$7.35 charge and the \$5.84 credit is only \$1.51. We trust that you will be able, in some manner, to get this amount off our statement before next month.

You will also note from our statement, which was sent you yesterday with our check, that we had debit memos amounting to \$908.18. No doubt your credits will be rendered and sent to us soon covering these debits.

With this explanation we hope we have made ourselves clear and that before the next month we will get all these matters adjusted, as we like to

(Testimony of John M. Storkerson.)

feel that we have our account in balance each month.

Yours very truly,

MONTGOMERY BROTHERS,

/s/ R. J. ROCHE.

RJR:da

cc acctg

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: May I ask you, Mr. Christin, for the original of that letter? You stated you thought it was not available; you would endeavor to locate it.

Mr. Christin: I didn't bring any correspondence prior to 1948. We will get it at the office and substitute the original for the copy.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a copy of a letter dated September 17, 1947, from Fenwal, Inc., to Montgomery Brothers, and ask if that letter was sent from Fenwal in the usual course of business? A. It was.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 19.

Mr. Christin: We will make the same objection to that, may it please the Court, as we made to the prior offer on the same grounds.

The Court: Admitted subject to objection.

The Clerk: Plaintiff's Exhibit No. 19 in evidence.

(Testimony of John M. Storkerson.)

(Letter dated September 17, 1947, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 19 in evidence.)

PLAINTIFF'S EXHIBIT No. 19

September 17, 1947

Via Air Mail
Montgomery Brothers
Mr. A. C. Drew
Account

Attention R. J. Roche

Thank you very much for your August check and may I express my personal appreciation for your interest in keeping your account in balance. Under separate cover, we are today forwarding a number of Credit Memos allowing the open deductions shown on your August statement. We are also adjusting the \$7.35 unlocated amount and the \$5.84 credit which do not belong to you. We have also forwarded you duplicate copies of invoice 7-5807, in the amount of \$3.83. With the above adjustments, only three items remain open as of August 31, as follow:

Invoice 7-5807	\$ 3.83
7-5905	6,141.25
7-5906	2,348.13

With regard to the last two items, we are sorry to report that due to the Army inspector's laxness in not getting here until September 4, shipment was not made in August.

(Testimony of John M. Storkerson.)

Our Directors have decided to let the basis of payment stay as it has been in the past. In other words, if you will forward your check by the tenth of the following month, a 1% cash discount will be allowed. However, this 1% is going to be changed for all customers to 1½% on January 1, 1948. Will you kindly make a note of this?

May I express my appreciation again for your cooperation in this matter with the request that on any future deductions, including discounts, you forward your Debit Memo, as this will greatly simplify our checking.

A. C. DREW,
Controller.

cc reg. mail

Mr. C J Robinson

em

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Will you please read the next to the last paragraph of Exhibit No. 19, Mr. Storkerson? [60]

A. "Our directors have decided to let the basis of payment stay as it has been in the past. In other words, if you will forward your check by the 10th of the following month, a 1 per cent cash discount will be allowed. However, this 1 per cent is going to be changed for all customers to 1½ per cent on January 1, 1948. Will you kindly make a note of this?"

(Testimony of John M. Storkerson.)

Q. Were you a director of Fenwal, Incorporated, at the time that letter was written?

A. I was.

Q. Do you know of your own knowledge whether or not the statement made in that paragraph is correct?

A. I do.

Q. Is it a correct statement of what the directors decided to do?

A. It is.

Mr. Christin: If your Honor please, I object to that as not binding on us, and hearsay.

The Court: It is admitted, subject to objection.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a copy of a letter dated November 24, 1947, to Montgomery Brothers from A. C. Drew, Controller, Fenwal, Incorporated, and ask you if that was sent in the usual course of business?

A. It was.

Q. I call your attention to the fact that stapled to the one-page communication there is a return post card signed "Montgomery [61] Brothers, R. J. Roche," and ask you if you know whether that was received by Fenwal in the usual course of business.

A. It was.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 20.

Mr. Christin: Objected to as irrelevant, immaterial and incompetent, not within the issues of the case.

The Court: Admitted subject to objection.

The Clerk: Plaintiff's Exhibit 20 in evidence.

(Testimony of John M. Storkerson.)

(Letter dated November 24, 1947, Fenwal to Montgomery, with attached post card, marked Plaintiff's Exhibit 20 in evidence.)

PLAINTIFF'S EXHIBIT No. 20

November 24, 1947

Montgomery Brothers
Mr. A. C. Drew
Discount Terms

Attention: Mr. Fred Montgomery

As you may wish to notify your customers in advance, we are hereby advising you that on all invoices dated January 1, 1948, and after, our terms will be $\frac{1}{2}\%$ 10 days, net 30, instead of 1% 10 days, net 30. Please change your records accordingly.

Will you kindly acknowledge receipt of this notification, by signing the enclosed post-card and mailing it back to us.

A. C. DREW,
Controller.

em

Enclosure 1

[Post Card]

We have received your notification of the discount change to $\frac{1}{2}\%$ effective January 1.

/s/ R. J. ROCHE,
Montgomery Brothers.

[Endorsed]: Filed July 11, 1950.

(Testimony of John M. Storkerson.)

Q. (By Mr. Doyle): Now after that telegram of February 21, 1949, that you sent to Montgomery Brothers, did you receive a reply?

A. We did.

Q. I show you an original telegram addressed to Fenwal, Incorporated, signed Montgomery Brothers, dated San Francisco, California, February 23rd, and ask you if you identify that as the telegram to which you have testified? A. It is.

Q. Would you read it, please?

A. "Fenwal, Inc., Attention A. C. Drew. Retel prefer to withhold January check until further relations are established as suggested in our letter February"—it has [62] "6 Y 15. Best regards. F. H. Montgomery."

Mr. Doyle: I offer this in evidence as Plaintiff's Exhibit 21 and request that it be marked by the Clerk accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 21 in evidence.

(Telegram February 23, 1949, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 21 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 21

Western Union

[Telegram]

Feb. 23

WU7 PD-MK San Francisco, Calif. 23 1100A

Fenwal, Inc.

Attn A. C. Drew

Retel Prefer to Withhold January Check Until
Future Relations Are Established as Suggested in
Our Letter February 6 Y 15. Best Regards.

MONTGOMERY BROTHERS,

F. H. MONTGOMERY.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you respond to the wire of February 23rd just identified?

A. We did.

Mr. Doyle: Do you have the original telegram?

Mr. Christin: Of what date?

Mr. Doyle: The 24th, Fenwal to Montgomery.

Mr. Christin: Yes. (Handing document to Mr. Doyle.)

Q. (By Mr. Doyle): I show you an original telegram dated February 24, 1949, addressed to Montgomery Brothers from Fenwal, Incorporated, J. M. Storkerson, General Manager, and ask you if you sent that telegram to Montgomery Brothers on or about its date? A. I did.

(Testimony of John M. Storkerson.)

Q. Will you read it, please.

A. Addressed to Montgomery Brothers.

“Your telegram of February 23 seems to us an attempt to force us to accept your terms for future relationships [63] by withholding payment of amounts admittedly due on February 10. That action leads us to feel that further negotiations with you are useless. Unless February 10th payment made by wire to us by February 25 we must stop shipments and notify customers of reason and arrange to satisfy them on deliveries. If you refuse settlement on basis of Walter’s letter of February 9th we propose arbitration under procedure of American Arbitration Association. Request wire reply on that by February 28th. Fenwal, Incorporated, J. M. Storkerson.”

Mr. Doyle: I will offer the document identified as Plaintiff’s Exhibit 22 and request that it be marked by the Clerk accordingly.

The Court: Admitted.

The Clerk: Plaintiff’s Exhibit 22 in evidence.

(Telegram dated February 24, 1949, Fenwal to Montgomery, was marked Plaintiff’s Exhibit 22 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 22

Western Union
[Telegram]

1949 Feb. 24 PM 2 41

SFAB 184 PD-SA Boston, Mass. 24 515P

Montgomery Bros.

1122 Howard St.

Your Telegram of February 23 Seems to Us an Attempt to Force Us to Accept Your Terms for Future Relationships by Withholding Payment of Amounts Admittedly Due on February 10. That Action Leads Us to Feel That Further Negotiations With You Are Useless. Unless February 10 Payment Made by Wire to Us by February 25 We Must Stop Shipments and Notify Customers of Reason and Arrange to Satisfy Them on Deliveries. If You Refuse Settlement on Basis of Walter's Letter of February 9 We Propose Arbitration Under Procedure of American Arbitration Association. Request Wire Reply on That by February 28.

FENWAL, INCORPORATED,

J. M. STORKERSON,

General Manager.

[Stamped]: Received February 24, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

(Testimony of John M. Storkerson.)

Q. (By Mr. Doyle): Did you receive a response from Montgomery Brothers to that telegram?

A. I did.

Q. I show you an original telegram addressed to Fenwal, Inc., from San Francisco, California, February 24th, signed Montgomery Brothers by F. H. Montgomery, and ask you if that is the telegram you received? A. It is. [64]

Q. Would you read it, please.

A. "Contract with you does not provide for payment February 10th. If you interfere with contracts with our customers and or fail to carry out your obligations including deliveries, we will hold you liable for all damages."

Signed "Montgomery Brothers, F. H. Montgomery."

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 23.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 23 in evidence.

(Telegram dated February 24, 1949, Montgomery to Fenwal, marked Plaintiff's Exhibit No. 23 in evidence.)

PLAINTIFF'S EXHIBIT No. 23

Western Union
[Telegram]

WU2 PD-San Francisco, Calif., Feb. 24 537 P
Fenwal, Inc.

Contract With You Does Not Provide for Pay-

(Testimony of John M. Storkerson.)

ment Feb. 10. If You Interfere With Contracts With Our Customers and or Fail to Carry Out Your Obligations, Including Deliveries, We Will Hold You Liable for All Damages.

MONTGOMERY BROS.,

F. H. MONTGOMERY.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you respond to that telegram, Mr. Storkerson? A. I did.

Q. I show you a telegram dated Ashland, Massachusetts, February 25, 1949, addressed to Montgomery Brothers and signed "Fenwal, Incorporated, J. M. Storkerson," and ask you if you sent that telegram on or about its date? A. I did.

Q. Will you read it, please?

A. "The terms on our order acceptances and invoices which you hold are $\frac{1}{2}$ per cent 10 days, net 30 days. Permission to pay the month's billings on the 10th of the following month was per a special agreement made at your request. [65] Also your promises in correspondence and practice clearly indicate your obligation to pay on the 10th. We are anxious to continue shipments to take care of customers. This requires that you make payment immediately per my wire yesterday. Correct date of Walter's letter to February 4th. Fenwal, Inc., J. M. Storkerson."

(Testimony of John M. Storkerson.)

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 24 and request the clerk to mark it accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 24 in evidence.

(Telegram dated February 25, 1949, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 24 in evidence.)

PLAINTIFF'S EXHIBIT No. 24

Western Union

[Telegram]

1949 Feb. 25 AM 10 44

SFAB077 Long PD-WUX Ashland, Mass. 25 21P
Montgomery Bros.
1122 Howard St.

The Terms on Our Order Acceptances and Invoices Which You Hold Are One-Half Per Cent 10 Days Net 30 Days Permission to Pay the Month's Billings on the 10th of the Following Month Was Per a Special Agreement Made at Your Request Also Your Promises in Correspondence and Practice Clearly Indicate Your Obligation to Pay on the 10th We are Anxious to continue Shipments to Take Care of Customers This Requires That You Make

(Testimony of John M. Storkerson.)

Payment Immediately Per My Wire Yesterday
Correct Date of Walter's Letter to February 4.

FENWAL, INC.,

J. M. STORKERSON.

[Stamped]: Received February 25, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Mr. Storkerson, the reference in that last sentence of this telegram "Correct date of Walter's letter to February 4"—to what does that refer?

A. That refers to a prior notice to them on which the wrong date was used.

Q. What do you mean by a prior notice to them?

A. A prior——

Q. Telegram?

A. I am not sure, Mr. Doyle. As I recall, it was relating to a telegram in which I mentioned and had gone back to Dr. Walter's letter.

Q. Directing your attention to Plaintiff's Exhibit 22 and to the next to the last sentence thereof, reading: "If you refuse [66] settlement on basis of Walter's letter of February 9,"——

A. That's it.

Q. ——"we propose arbitration." Is it that date that you were seeking to correct to February 4th?

A. Correct.

(Testimony of John M. Storkerson.)

Q. In other words, the Walter letter was February 4th and not February 9th?

A. That is right.

Q. Did you receive a reply from Montgomery Brothers to the telegram last identified?

A. I did.

Q. I show you, sir, an original telegram dated February 26, 1949, at San Francisco, California, to Fenwal, Inc., and signed "Montgomery Brothers," and ask you whether that telegram was received by you on or about its date? A. It was.

Q. Will you read it, please?

A. "Retel we are not refusing payment your invoices and never have but we prefer to withhold payment January invoices until sales agreement is signed as per our letter February fifteenth. We are very anxious to continue our very pleasant business relations, but must have sufficient time to protect our large investment in your line. We have never stopped for one minute promoting sales and expect all Fenwal customers to be [67] protected by prompt deliveries. Best regards. Montgomery Brothers, F. H. Montgomery."

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 25 and request that the Clerk mark it accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 25 in evidence.

(Telegram dated February 26, 1949, Montgomery to Fenwal, was marked Plaintiff's Exhibit 25 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 25

Western Union
[Telegram]

1949 Feb. 26 PM 3 06

BA075 OA180

O.SFD079 DL PD-MK

San Francisco, Calif. 26 1135A

Fenwal, Inc.

Attn J. M. Storkerson, Ashland, Mass.

Retel We Are Not Refusing Payment Your Invoices and Never Have but We Prefer to Withhold Payment January Invoices Until Sales Agreement Is Signed as Per Our Letter February Fifteenth. We Are Very Anxious to Continue Our Very Pleasant Business Relations but Must Have Sufficient Time to Protect Our Large Investment in Your Line. We Have Never Stopped for One Minute Promoting Sales and Expect All Fenwal Customers to Be Protected by Prompt Deliveries. Best Regards.

Montgomery Brothers,

F. H. MONTGOMERY.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Did you receive a reply to that telegram? A. I did—not——

Q. Pardon me. Did you send a reply?

(Testimony of John M. Storkerson.)

A. I sent a reply, that's right.

Q. I show you an original telegram dated February 28, 1949, addressed to Montgomery Brothers, San Francisco, and signed Fenwal, Inc., J. M. Storkerson, and ask you if you sent that telegram on or about its date? A. I did.

Q. Read it, please.

A. "Shall discontinue shipments on your orders which have been accepted by us unless we receive today wire payment of amount due February 10 plus \$17,727.44 on February shipments, plus your agreement to make sight draft payment for future shipments. Unless this done all contracts will be cancelled at close of business today. Fenwal, Incorporated, J. M. Storkerson." [68]

Mr. Doyle: I offer the telegram identified as Plaintiff's Exhibit No. 26 and request that it be marked in evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 26 in evidence.

(Telegram dated February 28, 1949, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 26 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 26

Western Union
[Telegram]

1949 Feb. 28 PM 12 28

SFAB087 PD-WUX Ashland, Mass. 28 233P
Montgomery Bros.
1122 Howard St.

Shall Discontinue Shipments on Your Orders Which Have Been Accepted by Us Unless We Receive Today Wire Payment of Amount Due February 10 Plus \$17,727.44 on February Shipments Plus Your Agreement to Make Sight Draft Payment for Future Shipments. Unless This Done All Contracts Will Be Cancelled at Close of Business Today.

FENWAL, INC.,

J. M. STORKERSON.

[Stamped]: Received February 28, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you receive any reply to that telegram?

A. As I recall, I did receive a reply.

Q. The last question was whether you received a reply to the telegram of February 28, 1949. I think your answer was that you believed you did. I do not find a record of it. Do you have it with you?

(Testimony of John M. Storkerson.)

A. No, I do not. Actually I don't remember. There was another wire that I thought came in from Montgomery Brothers. I was trying to recall it.

Q. Was there another wire from you to Montgomery at about that time?

A. Yes, I wired them that we had sent a cancelling letter, or something to that effect.

Mr. Christin: Just a moment. Would you produce that, if you have it? I have no such copy with me. I think there was none. I asked the witness if he had it, and he says he hasn't.

The Witness: May I see the last telegram which you asked about? [69]

Q. The last telegram I have here sent by you to Montgomery Brothers is dated February 28, 1949, if you will examine it, please.

A. That's right. Subsequent to that I know we sent a letter of cancellation, and I believe I wired them a cancellation.

Q. I show you a telegram dated March 2, 1949, from Ashland, Massachusetts to Montgomery Brothers, San Francisco, Fenwal, Inc., J. M. Storkerson, and ask you if you sent that telegram to Montgomery Brothers on or about its date? A. Yes, I did.

Q. Will you read it, please?

A. "Regret that your failure to take action under our telegram of February 28th has necessitated cancellation of your contracts with us. Letter following. Best regards. Fenwal, Inc., J. M. Storkerson."

Mr. Doyle: I offer the telegram identified in evi-

(Testimony of John M. Storkerson.)

dence as Plaintiff's exhibit next in order and request the clerk to mark it appropriately.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 27 in evidence.

(Telegram dated March 2, 1949, Fenwal to Montgomery, marked Plaintiff's Exhibit No. 27 in evidence.)

PLAINTIFF'S EXHIBIT No. 27

Western Union
[Telegram]

1949 Mar. 2 PM 12 43

SFAB 100 PD-WUX Ashland, Mass. 2 309P
Montgomery Brothers
1122 Howard St.

Regret That Your Failure to Take Action Under Our Telegram of February 28 Has Necessitated Cancellation of Your Contracts With Us. Letter Following. Best Regards.

FENWAL, INC.,
J. M. STORKERSON.

[Stamped]: Received March 2, 1949, Montgomery Bros.

[Endorsed]: Filed March 2, 1949.

Q. (By Mr. Doyle): I show you a letter, Mr. Storkerson, dated March 3, 1949, from Fenwal, Inc., J. M. Storkerson, General Manager, to Montgomery

(Testimony of John M. Storkerson.)

Brothers, and ask you if you [70] sent that letter on or about its date? A. I did.

Q. Is that the "Letter follows" referred to in the wire?

A. Correct; it is. It is a copy of it.

Mr. Christin: Here is the original, Mr. Doyle.

Mr. Doyle: Thank you. I request that the document identified be marked as Plaintiff's Exhibit 28 and I offer it in evidence.

Q. Is this your signature, Mr. Storkerson, on the end of that letter? A. It is.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 28 in evidence.

(Letter dated March 3, 1949, Fenwal to Montgomery Brothers, marked Plaintiff's Exhibit No. 28 in evidence.)

PLAINTIFF'S EXHIBIT No. 28

Fenwal
Ashland, Massachusetts
Fenwal, Incorporated

March 3, 1949

Air Mail Registered
Return Receipt Requested
Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Gentlemen:

In view of the fact that no reply or payment of amounts admittedly overdue was received as a re-

(Testimony of John M. Storkerson.)

sult of our telegrams of February 28 and that payment was not made in accordance with previous telegraphic requests, it has been necessary to follow through on action in accordance with our wire and cancel all contracts. Balances open on the following orders are cancelled due to your failure to make payment when due on these and other orders which have been accepted:

Order No. 13832

13565

13564

13570

13569

Balances open on the following orders are cancelled due to your failure to make payment as indicated in the preceding paragraph, and in accordance with our telegraphic request:

Order No. 15814

15929

15328

15767

15908

14583

14581

14198

15750

15884

15645

15476

15475

14966

Order No. 14854

14853

14850

14847

14846

14845

14714

14366

14397

14364

14363

14208

15816

15348

(Testimony of John M. Storkerson.)

Order No. 14965

Order No. 15743

14964

14989

14963

14971

14251

14365

13905

14086

13904

15934

13571

15752

13567

14422

13337

15660

13089

15875

13086

14278

13083

15497

The following unaccepted orders are returned herewith:

Order No. 15450

Order No. 15532

15509

15533

15581

15534

15519

15703

15517

15867

15518

15744

14429

15781

15152

15810

15153

15769

15154

15829

15155

15830

15232

15872

15403

15877

15404

15879

15405

15880

15406

15885

(Testimony of John M. Storkerson.)

Order No. 15407	Order No. 15914
15409	15915
15410	15916
15411	15917
15521	15918
15522	15919
15530	15920
15523	15921
15524	15926
15525	15927
15526	15940
15531	15949
15527	15971
15528	15987
15529	15990
15995	16019
15996	16022
15997	16032
15999	16033
16010	16038
16012	16050
	16053

We are also submitting the attached summary statement of your accounts to March 1, on which we request immediate payment in full.

I deeply regret that your action has made it impossible to complete the negotiations on which I thought we were making satisfactory progress.

However, you must have recognized that by withholding payments to us which had nothing to do with

(Testimony of John M. Storkerson.)

those negotiations, you would place us in an absolutely untenable position blocking any further effort to bring the matter to a solution which we hoped could be brought about in a prompt and mutually satisfactory manner.

Best regards.

Very truly yours,

FENWAL INCORPORATED,

/s/ J. M. STORKERSON,
General Manager.

JMS:MM

Encl.

Received March 5, 1949.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you receive a wire from Montgomery Brothers following the dispatch of the letter that you have just identified?

A. Yes.

Q. I show you an original telegram dated at San Francisco March 5, 1949, addressed to Fenwal, Inc., signed Montgomery Brothers, and inquire whether that is the wire received by you on or about that date?

A. It is.

Q. Would you read it, please. [71]

A. "Retel March 2 and letter March 3 just received. No amounts are admittedly overdue. You will be held liable in damages for any and all con-

(Testimony of John M. Storkerson.)

tracts that you cancel or for your failure to make all deliveries on all contracts. (Signed) J. M. Storkerson,"—wait a minute; signed "Montgomery Brothers."

Mr. Doyle: The document identified is offered in evidence as Plaintiff's exhibit next in order and ask the clerk to mark it accordingly.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(Telegram dated March 5, 1949, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 29 in evidence.)

PLAINTIFF'S EXHIBIT No. 29

Western Union
[Telegram]

WU1 NL PD-F San Francisco, Calif., March 5
Fenwal, Inc.

Retel Mar. 2 and Letter Mar. 3 Just Received Mo. Amounts Are Admittedly Overdue. You Will Be Held Liable in Damages for Any and All Contracts That You Cancel or for Your Failure to Make All Deliveries on All Contracts.

MONTGOMERY BROTHERS.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Was there any further correspondence between Montgomery Brothers and

(Testimony of John M. Storkerson.)

Fenwal, Incorporated so far as you are aware?

A. Not that I remember related to this matter.

Q. Were there any further discussions with Montgomery Brothers on the subject of this contract termination and with respect to your telegram?

A. Yes, there were.

Q. Where did those take place?

A. They took place in Los Angeles over a period of several days.

Q. When?

A. That was in the week of March 7th, and they took place on [72] the 8th, 9th, 10th and 11th.

Q. You came to Los Angeles? A. I did.

Q. Alone?

A. No, I came with—I wasn't alone; I came with Carroll Robinson, who is our Sales Manager.

Q. Your what? A. Our sales manager.

Q. Did you meet the Montgomery Brothers, or either of them at Los Angeles?

A. I met Mr. Ray Montgomery.

Q. Tell us where and when and the circumstances, and what was said as best you recollect it, in your own way? When it was, who was present, and what was said.

A. It was on the morning, as I recall, of the 8th of March, and it—the meeting took place at the offices—purchasing offices of Lockheed Aircraft Corporation at Los Angeles. The circumstances under which met were that I had gone to California; because of the situation that was brought about by the cancellation of the contracts we were—back at

(Testimony of John M. Storkerson.)

the plant were in a difficult situation; we had——

Mr. Christin: If your Honor please, I don't think that is material, or binding on us. I think it was hearsay.

The Court: You may continue.

The Witness: We were lacking in—had our working funds [73] tied up; we had no way of making shipment; we were producing; we were in a situation where if we had continued on, that our working capital would have been bled right out of the corporation. We knew that there were customers on the west coast who were expecting—customers of Montgomery Brothers expecting their orders to be filled, and in case we terminated Montgomery Brothers those customers were expecting to have their contracts completed and shipments made regularly. And of course that was just impossible for us to do. Furthermore, the customers were actually looking for direct shipment in many cases from our plant in Ashland. So I went out to Lockheed Aircraft Corporation to talk over with them the general situation to see how it might be resolved, and fortunately the second morning I learned that Mr. Montgomery was in the offices of the Lockheed Corporation purchasing department; therefore a meeting was arranged between Mr. Ray Montgomery and myself.

Q. (By Mr. Doyle): What occurred, please?

Mr. Christin: Who was present, please?

A. Just Mr. Ray Montgomery and myself alone. We—I met him in the office, and I don't remember

(Testimony of John M. Storkerson.)

the exact discussion except that the question was what was going to be done about the situation. I told him that we were—obviously were not going to and couldn't ship anything more from our plant unless we could expect to be paid for it. And he wanted to know what we should do about it—what we were going to do about it, and I suggested [74] that we arrange for assignments immediately so that the customers could be taken care of and that shipments could be released to the various people who were expecting shipment here on the West Coast. He agreed to that. Therefore—thereafter, I said to him, "Well, in that event, let's call in the people from Lockheed who are directly interested and announce our agreement."

Now, as part of that agreement there—I don't remember exactly when it transpired, whether it was at the time in the office or directly afterwards—Mr. Montgomery said that in connection with these assignments that we had decided to develop, that he would demand a paper from us signed by us which would—I don't know the technical legal term, that he used for it; in any event, it meant by their action assigning that they would not be—would not lose any of their rights against our company, and such a paper was prepared after, as he said, consultation with San Francisco. And after receiving that paper I called our attorneys and discussed the matter with them, and after discussing it with them I said if that was to be the case, it

(Testimony of John M. Storkerson.)

would have to be both ways; that we should be on a fair, equitable position on the paper, to which he agreed. And so the assignment arrangement was executed.

Q. Did you execute such an agreement?

A. I did.

Q. I show you a document dated March 9, 1949, addressed to [75] Montgomery Brothers, 1122 Howard Street, San Francisco 3, California, signed J. M. Storkerson, Fenwal, Inc., March 10, 1949, and W. Ray Montgomery, Montgomery Brothers, March 10, 1949, and ask you if that is the document to which you have referred?

A. That is the document.

Q. That is your signature? A. It is.

Q. Was it signed by Mr. Montgomery in your presence? A. I believe it was.

Q. You say that this document was presented by Mr. Montgomery in the first instance?

A. It was.

Q. And then you said you called your counsel about it?

A. And we had to make a modification.

Q. You mean your counsel in Boston?

A. Correct.

Mr. Doyle: I offer the document identified as the Plaintiff's Exhibit next in order.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 30 in evidence.

(The assignment referred to was marked Plaintiff's Exhibit No. 30 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 30

March 9, 1949

Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Gentlemen:

It is understood and agreed by and between Montgomery Brothers and Fenwal Incorporated that Montgomery Brothers in assigning to Fenwal Incorporated any and all unfilled orders for Fenwal products that it does not constitute a waiver of any of the rights of either Montgomery Brothers against Fenwal Incorporated or Fenwal Incorporated against Montgomery Brothers, arising out of contracts between them.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date: March 10, 1949.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

Date: March 10, 1949.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Mr. Storkerson, will you read exhibit 30, please? [76]

(Testimony of John M. Storkerson.)

A. This is to Montgomery Brothers, 1122 Howard Street, San Francisco 3, California.

“Gentlemen:

“It is understood and agreed by and between Montgomery Brothers and Fenwal, Incorporated, that Montgomery Brothers in assigning to Fenwal, Incorporated, any and all unfilled orders for Fenwal Products that it does not constitute a waiver of any of the rights of either Montgomery Brothers against Fenwal, Incorporated, or Fenwal, Incorporated, against Montgomery Brothers, arising out of contracts between them. (Signed) J. M. Storkerson, W. Ray Montgomery.”

Q. What change was it that you say was made in this assignment after it was presented to you by Mr. Montgomery following your conversation with Boston counsel?

A. If I may see it, I could show you the part that has been changed.

Mr. Christin: We submit that that is in no way binding on us, is hearsay, and incompetent, between them and their counsel.

The Court: He may answer, subject to the objection.

The Witness: The original one merely stated that the agreement here does not constitute a waiver of the rights of either Montgomery—no, of Montgomery Brothers against Fenwal, and said nothing about Fenwal against Montgomery. [77]

Q. And you had that insertion made?

A. Yes.

(Testimony of John M. Storkerson.)

Q. Were assignments then actually executed of the aircraft company orders so that they were assigned over to Fenwal? A. They were.

Q. In each instance?

A. That procedure covered all the major aircraft companies, and in answering I would say that I am not sure assignments were made in all instances although there were different mechanics of handling each one.

Q. Would you say that substantially the same procedure was followed? A. Correct.

Q. Were there any further discussions held with Montgomery Brothers at or about that time?

A. Yes, there were continuing discussions during the week of the 7th while we worked with the various aircraft companies in getting the paper work all straightened out, and making the announcements all through the Los Angeles area, and there were discussions also subsequent to that period.

Q. Where? A. In San Francisco.

Q. When?

A. The first discussions were in Los Angeles.

Q. You have told us about those. Was there a discussion [78] in San Francisco?

A. There was discussion—there was discussion in San Francisco, right.

Q. When?

A. That was on the morning of the 12th.

Q. Who was present?

(Testimony of John M. Storkerson.)

A. At that discussion was Mr. Fred Montgomery, Carroll Robinson and myself.

Q. Where was it?

A. It was at the offices of Montgomery Brothers in San Francisco.

Q. What was said?

A. We said that we were there to discuss with Mr. Fred Montgomery the situation with regard to the rest of the orders which had not been handled by assignment. We said also that we were there for purposes of—well, basically, that is one of the reasons we came in, and a second reason we came in was to talk over with him the possibilities of some final settlement of the whole affair.

When I came into Mr. Montgomery's office he had on his desk a very large stack of small orders.

Q. Aircraft orders?

A. I think mostly industrial, from all over the area. Each individual order might only be worth a few dollars in the total transaction, and his question was, "What are we going [79] to do with all these orders? We certainly are not going to make out an assignment on all of that," which I agreed to; if we couldn't by some way work out—the cost in time of working out assignments on all these individual orders would have been prohibitive. He suggested, "Why don't we go ahead and ship them," and he would agree to pay for them. And I told him at that time that we certainly were not going to make shipment unless we could be sure we were going to receive payment; that he had already with-

(Testimony of John M. Storkerson.)

held more funds than he could possibly ever claim against us, and we were not going to persist in shipping unless we knew that the money would be forthcoming. So at that time I asked for some kind of a guarantee on such orders, under which we would be—which we would require in connection with making shipments, and he asked me—he seemed to be disturbed about that, it was an affront to the credit situation. I explained to him that it had nothing to do with my questioning his credit ability, but I was questioning his willingness to pay. Therefore, it was finally worked out that he would secure a bank guarantee from their bank here in San Francisco guaranteeing the accounts, on which basis we would proceed to make shipments to all—on all of these small orders, and a further stipulation in that connection was, because of the funds withheld, which was the fact that I insisted that we would sell him at their indicated billing price to prevent any further accumulation of funds on their part, which we felt [80] would be grossly unfair, and he agreed to that.

We also had some discussion in connection with the credit arrangements there, and Mr. Montgomery had certain comments to make with regard to the weakness of our company and the strength—comparative strength of theirs, and as I recall had a Dun & Bradstreet report available on our financial condition.

Q. Were those small orders assigned?

(Testimony of John M. Storkerson.)

A. No, they were not. They were shipped under the bank guarantee.

Q. Under the guarantee? A. Correct.

Q. Did that terminate your discussion with Mr. Montgomery?

A. No; I went on to talk to him about the fact that I was very sorry that this situation had developed the way it had, and I couldn't understand their actions in withholding payments. I explained to him, I think quite carefully, how I felt that that was taking the working capital away from a small company with definitely limited working funds and how any such amount as was withheld—it was definitely withheld upon his knowledge, that our plant couldn't exist except for a very brief period of time, we couldn't live with a situation like that and continue to ship; that I felt it was forcing us to accept the terms of their proposal for a new contract—their various proposals that they had made. What I wanted to do was to, if [81] possible, ask him what was the very best proposal he would have to offer to Fenwal on clearing up the entire matter there and forgetting about it.

Q. Was that all?

A. I know that as a result of that——

Q. No, I don't want to know the result of it; I want to know if there was anything else said there.

A. Yes, there was more said. He said that—we argued quite a little bit about what such arrangements might be.

(Testimony of John M. Storkerson.)

Q. Never mind the detail, Mr. Storkerson. If you can, give the substance of the balance of that conversation if you have not already covered it.

A. Well, I said to him that I felt there should be an amount granted Fenwal from what they determined the contract price to be by virtue of the fact that they were not performing services and were not covering the credit, and we discussed the work that was required to sustain these long term contracts. We had a very lengthy discussion with regard to what it actually means to handle these rather complicated orders for the various aircraft companies particularly, and he finally—at the end he made some—he said—he told me what he would be willing to offer, which as I recall, was——

Mr. Christin: If your Honor please, this goes into an offer of compromise. I think that the matter was all adjusted at that time. They had their assignment and they had taken [82] care of these other orders.

Mr. Doyle: He needn't proceed; that is all right, Mr. Christin; he needn't proceed. You needn't object.

Q. You didn't reach any agreement?

A. No.

Q. Did you have any further conversation?

A. No, I went home from there.

Q. You went home?

A. The only agreement we had there was an arrangement for taking care of these small orders under the bank guarantee.

(Testimony of John M. Storkerson.)

Q. Did you have any further discussion with Montgomery Brothers? A. No.

Q. That was the last?

A. That was the last.

Q. Going back to the 60-day period of January and February, 1949, did you make shipments during that period on the orders which had been placed with you by Montgomery Brothers?

A. Yes, on the——

Q. And at the end of January when you sent your bill to Montgomery Brothers, how much showed on that bill?

A. At the end of January it was very close to \$30,000, as I recall it.

Mr. Christin: Have you got copies of the invoices you sent? [83]

Mr. Doyle: I will show you how the invoices will appear. I am not going to offer this, Mr. Christin, but if you want to offer it——

Mr. Christin: All right.

Mr. Doyle: I just wanted you to see it.

Q. I hand you, Mr. Storkerson, what I understand to be the original ledger entries of Fenwal, Incorporated. A. That is correct.

Q. And ask you if you can tell me from the original ledger entries what the amount of the bill was on March 1, 1949, and how you determine that from those entries.

Mr. Christin: If your Honor please, we submit respectfully that the invoice itself is the best evidence.

(Testimony of John M. Storkerson.)

Mr. Doyle: I haven't got the invoices.

Mr. Christin: I have a copy of it.

Mr. Doyle: May I have the invoice? It was sent to you.

Mr. Christin: If you had asked me to produce it—I haven't it with me.

Mr. Doyle: It was sent to you.

Mr. Christin: It was.

Mr. Doyle: This is the document from which it was prepared.

Mr. Christin: I will have it in the morning. You didn't ask for it today. If you have a copy, I have no objection to using the copy. [84]

Mr. Doyle: This is the document from which it was taken. I would like to get the witness' testimony.

Mr. Christin: All right; that is all right.

Mr. Doyle: You have the original.

Mr. Christin: Very well.

Mr. Doyle: Proceed, Mr. Storkerson, if you please.

A. The amount due us at the close of business of February—I believe you said March 1st——

Q. Tell us what you have got there, how it was prepared, and how you read those figures.

A. We have an automatic bookkeeping system under which when a shipping document comes up to the accounting department against which we make a bill, this machine takes one of these ledger cards and they bill and duplicate the information on

(Testimony of John M. Storkerson.)

both cards, so at any given moment what you see on here should be an exact duplicate of any bill that we issue. They are made simultaneously.

Q. So that the bill that went forward in February for January was made up from the entries on that ledger? A. Correct.

Q. Is that correct? A. That is correct.

Q. Now will you please state what was due at the end of January and what was due at the end of February?

A. All right. Let me give you at the end of February first. [85] That is \$48,082.79.

Mr. Christin: Again, please.

A. \$48,082.79.

Q. (By Mr. Doyle): At the end of January?

A. January 31, \$30,359.53.

Q. Was a statement in the latter amount sent to Montgomery in the usual course of business in the early part of February prepared from the document you hold in your hand? A. Yes.

Mr. Doyle: I understand, Mr. Christin, that you will produce that document at your convenience.

Mr. Christin: Yes, sir. I will not produce a document in that amount; I will produce the invoices but not in that amount.

Q. (By Mr. Doyle): The amount due at the end of February was reduced thereafter?

A. It was, yes.

Q. To what extent and in what manner?

A. It was reduced—it was reduced to \$46,620.70.

Q. How?

(Testimony of John M. Storkerson.)

A. That is made up of a series of credit memorandums which are listed here under a column called "Credits." Those credit memorandums are related to adjustments of transactions previously made in several ways. Some examples are as follows: It could be an error may have been made which required correction, material may have been shipped back against a given order by a customer—and there were a number of such adjustments [86] that are common to this business.

Q. When was your last credit entry made?

A. July 29th.

Q. Of what year? A. 1949.

Q. That is a year ago? A. That is right.

Q. What was the balance upon the entry of the last credit memorandum? A. \$46,620.70.

Q. What is the balance today?

A. The balance today—

Q. Has that remained unchanged?

A. This remains unchanged, correct.

Q. Has any of it been paid?

A. None has been paid.

Mr. Doyle: Your witness, Mr. Christin.

The Court: We will take a recess before cross-examination.

(Recess.)

(Testimony of John M. Storkerson.)

Cross-Examination

By Mr. Christin:

Q. Mr. Storkerson, how long did you say you were connected with the Fenwal Company?

A. I joined Fenwal in February, 1945.

Q. And what was your training prior to that time? Are you an [87] engineer or a public relations man or a finance man?

A. I was a graduate of the University of Minnesota in Electrical Engineering, was a graduate of the Harvard School of Business. After that I joined the Westinghouse Electric & Manufacturing Company as a sales engineer, salesman and purchasing agent.

Q. What was your capacity as far as your duties were concerned in 1948 and 1949?

A. General Manager.

Q. What is that? A. General Manager.

Q. And you had what functions in that capacity? A. I beg your pardon?

Q. What functions did you have in that capacity? What did you do?

A. I was the manager in charge of some five or six men on different occasions who had charge of the various operations of the business; in other words, to manage the business and develop sales.

Q. Who is Dr. Walter?

A. Dr. Walter is Dr. Carl Walter; he is the President of the Company.

(Testimony of John M. Storkerson.)

Q. He is a physician and surgeon, isn't he, practicing? A. That is correct.

Q. He is a Professor of Harvard University of Medicine? A. Correct. [88]

Q. You were telling us about the procedure when an order came in, and as I understand it an order would come from Montgomery Brothers and then it would be accepted by Fenwal, is that correct?

A. It went through the process of acceptance.

Q. There was one acceptance upon receipt of the order, then the order was further processed and then a second acceptance was sent to Montgomery Brothers, is that correct? A. That is correct.

Q. And that was done during the entire time of your business relationships with Montgomery Brothers, is that correct?

A. To the best of my knowledge.

Q. At any time can you recall, did you refuse to accept an order when lodged by Montgomery Brothers?

A. At the outset of a number of orders we were required corrections before we would accept them.

Q. Well, they were corrected and then accepted, is that correct? A. Correct.

Q. What would be the nature of the exceptions which you had in order to have the order corrected?

A. As I remember, there could be—there were problems, technical problems relating to specifications, correctness of the order as it was entered; it

(Testimony of John M. Storkerson.)

could be a matter of price—such things as [89] that.

Q. And when those matters occurred you would deal directly with Montgomery Brothers to adjust those matters and they would not be taken up with the actual consumer, is that correct?

A. Correct.

Q. Did you have any direct contact during these times when the order was going through the process with the consumer?

A. Me personally?

Q. No, I mean your organization.

A. Yes, we did.

Q. In what way?

A. We made a number of calls to the various customers throughout this Coast which were technical in nature, to assist Montgomery Brothers in connection with certain specialized problems.

Q. I am not referring to that; I mean when the order was sent to you by Montgomery Brothers and at the time of acceptance or prior thereto, for any irregularity in the order as to, as you say, some mechanical situation or electrical problems, would you confer with the customer to rectify that situation, or would you take it up with Montgomery Brothers directly?

A. We would take it up with Montgomery Brothers.

Q. Can you give me any instance at all in your experience with Montgomery Brothers in which you refused to accept an order asking some minor

(Testimony of John M. Storkerson.)

adjustment or some technicality, whether it was engineering problem or price? [90]

A. Not that I know of.

Q. What was done with reference to delivery dates when an order came in? Would the order as it came in have the delivery date specified, or would that be determined after the order was accepted by you?

A. To the best of my recollection, on most orders coming in there would be a request of delivery.

Q. And in some instances you stated that due to your production line you would have to check up with your production line to see whether you could handle some particular order; is that correct?

A. That would be true of practically all the orders.

Q. How long a time would expire on the average between the time you accepted the order and sent out the first acceptance and the time you sent out a second acceptance, normally?

A. It is hard to say; it might be a few days; it might be two weeks; it might be longer.

Q. Did you ever, prior to the month of January, 1949, refuse to accept all orders in their entirety?

A. I don't know whether we did or not.

Q. Well, you are the general manager. Don't you know that situation?

A. I don't know of any such instance.

Q. Now, then, you said that the order would be processed and one copy of the order would go to the

(Testimony of John M. Storkerson.)

finance or the credit department, is that [91] correct? A. Correct.

Q. Each and every order of Montgomery Brothers was checked for their credit; is that correct?

A. It went through the same process.

Q. Hadn't Montgomery Brothers established a line of credit long prior to that time so as not to have each individual order processed for credit?

A. All orders go through that procedure regardless of the fact that they may have an established rating on the card.

Q. Did you have Montgomery Brothers' established rating on a card?

A. In the case of Montgomery Brothers they were well enough established that we had the card.

Q. What was the rating on that card?

A. That card was not filled in, because it was the accepted practice——

Q. In other words, at some time during the course of your contact with Montgomery Brothers prior to January 1, 1941, they had established with you a line of credit? A. They had.

Q. To your satisfaction?

A. That is correct.

Q. Do you know to what extent that line of credit—the maximum was for the given months of 1948? By that I mean what were the [92] invoices that were sent out at the end of any given month of the year 1948?

A. I don't understand your question.

Mr. Christin: Strike that, then.

(Testimony of John M. Storkerson.)

Q. During the year 1948, what was the highest amount of any invoice that was sent to Montgomery Brothers for any given month?

A. I don't know.

Q. Have you any books or records here to show that? A. I could find it from the records.

Q. Well, if I asked you if it appeared to be true, would you say that in September the billing was \$36,400; October, \$34,648; November, \$34,000; December, 1948, \$30,488—does that sound reasonable to you or in keeping with the books as you now remember them?

A. It doesn't sound unreasonable.

Q. At any time during those months was any notification given to Montgomery Brothers that that credit had been impaired in any way so far as your credit standing was concerned?

Mr. Doyle: Mr. Christin, it is stipulated that their credit was good and that they regularly paid their bills up until the time of this particular occurrence about which we complain.

Mr. Christin: Very well.

Mr. Doyle: So that that examination is unnecessary. If you wish to pursue it—— [93]

Mr. Christin: I do not, as long as I get the stipulation.

Q. In 1942 were you connected with the Company? A. No.

Q. You went there in 1945? A. Correct.

Q. Can you state in fractions what proportion

(Testimony of John M. Storkerson.)

of your production was going to Montgomery Brothers and what went to other customers?

A. I would have to check the record on that.

Q. Are those figures available so that they may be produced during this trial?

A. They could be produced.

Q. Do you know in the year 1948 how much of your production went to Montgomery Brothers and how much to other customers?

A. I don't know.

Q. Are those figures available?

A. 1948, yes.

Q. If so, will you please work it out for us?

Mr. Doyle: Well, I won't agree that he work it out. Please don't leave that impresssion, Mr. Christin, because I think it is entirely irrelevant as to how much of the production went to Montgomery Brothers and how much to the other customers. The fact is the contract was subject to cancellation and was cancelled.

Mr. Christin: Yes, but you went into many matters to show the situation with Montgomery [94] Brothers.

Mr. Doyle: We will stipulate that a substantial part of the production of Fenwal went to Montgomery Brothers' customers; exactly what part I am unable to state, and it would be with some difficulty that we could get the records.

Mr. Christin: The witness said he could supply the information. If he can't—I will ask him in the

(Testimony of John M. Storkerson.)

morning. He said he thought he might be able to do it. If available without too much work, I would like to have it.

Q. During the January and February months of 1949, some of the orders which had been lodged by Montgomery Brothers were accepted, is that correct?

A. During the months of January and February.

Q. —February, 1949?

A. Yes, I believe that is right.

Q. And some were not accepted?

A. That is right.

Q. Was there any reason why you took some and not the others?

A. As I remember, the orders which were accepted were those on which shipment would be made during the termination period and on which we were prepared at that time to offer Montgomery Brothers their full profit.

Q. Well, during the termination period did you refuse to accept any orders which would not be filled and delivered prior to March 1, 1949?

A. Did we refuse to accept orders that would be filled and [95] completed before March 1st?

Q. After March 1, 1949.

A. The orders that we did not accept were the ones where shipment ran beyond the termination period.

Q. You accepted no orders then for delivery where delivery was after March 1, 1949?

(Testimony of John M. Storkerson.)

A. I can't answer to a hundred per cent, but in general I think that is true.

Q. At the time that this termination notice went out, did you participate in its preparation?

A. Yes.

Q. I read from the notice: "This will notify that we elect to terminate"—this was dated December 29, 1948. "This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective 60 days after the receipt by you of this letter." Did you dictate this letter or was it dictated by someone else?

A. As I remember, that was handled by the President of the Company.

Q. Were you consulted as General Manager before this letter went out as to its contents?

A. I was aware of its preparation and its contents.

Q. I call your attention to the language, "This termination to be effective 60 days after receipt by you of this letter." [96] Can you explain to me what you meant by those words?

A. It not being my letter basically, except to be aware of the general intent behind it—

Q. And what was that?

A. To effect the termination under the agreement that we had with Montgomery Brothers.

Q. Isn't it a fact that the agreement would con-

(Testimony of John M. Storkerson.)

tinue in full force and effect and it was to be lopped off on the 60th day?

A. I am sorry; would you ask that question again?

Q. I will ask you in this way: Is it not your understanding that for the 60 days during this period that the contractual relationship of the parties would continue and it would terminate at the end of the 60th day?

Mr. Doyle: That calls for the conclusion of this witness on a question of law as to the duration of the agreement and the sufficiency of the notice. The notice was either sufficient or not, and the termination is admitted in the answer to the complaint. There is no dispute that the agreement was terminated.

Mr. Christin: I am asking as to what his understanding was.

Mr. Doyle: You are asking him for his legal conclusion of the contractual relationship.

Mr. Christin: I am asking for his understanding.

Mr. Doyle: I object to the question upon the ground that it calls for a conclusion of the [97] witness.

Mr. Christin: I am asking the witness to tell me what he understood the contractual rights of the parties, to be, not legally, but his understanding during this 60 day period. He was going to do what, and under what conditions or circumstances.

The Court: He may answer.

(Testimony of John M. Storkerson.)

A. Well, from a legal point of view, I don't know. It was my intent to go ahead and work with them under our normal arrangement for a 60 day period.

Q. (By Mr. Christin): Was it normal for you to refuse to accept orders prior to this 60 day period? You had accepted all orders prior to that time, hadn't you?

A. I am sorry; I don't understand you.

Mr. Christin: If your Honor please, I lost a tooth yesterday, so I will apologize to the Court.

The Court: I lost all mine years ago.

Mr. Christin: Maybe I am not accustomed to this loss at the present time.

Q. I will ask you this again: Prior to the months of January and February of 1949 had you at any time refused to accept orders?

A. Not to my knowledge.

Q. And I am correct in saying there was a change in the procedural matters under that contract in January and February you did not have prior to that time?

A. I presume it is. [98]

Q. Had you prior to January 1, 1949, advised Montgomery Brothers of your limited capital to carry on an operation and that the sum of \$30,000 would cause you financial embarrassment, if you had outstanding receivables of \$30,000 you would be embarrassed financially? Had you advised Montgomery Brothers of that situation?

A. That was out of my sphere.

(Testimony of John M. Storkerson.)

Q. So far as you know, they were not advised?

A. I don't know.

Q. But you didn't advise them as general manager?

A. No, sir, to the best of my knowledge.

Q. Well, did you or didn't you?

A. I don't remember explicitly.

Q. After any exchange of telegrams, you asking for an appointment to San Francisco and they saying they would like to see you arrive in San Francisco—is that correct? A. Yes, sir.

Q. And that brings us to the office of Montgomery Brothers on the morning of January 24, 1949? A. Right.

Q. Will you tell me who was present when you came into that office that morning?

A. My best recollection, when I first got into it was that Fred Montgomery was there.

Q. And then Ray Montgomery appeared, is that right? [99] A. As I recall.

Q. That conversation, that conference, lasted for two days? A. That is right.

Q. On and off during the two-day period?

A. That is right.

Q. Did I understand you to say that at one time Fred Montgomery would be in the office and another time Ray Montgomery, is that right? They would leave the office, and go into their private offices for some private business; isn't that correct?

A. On occasions I remember that occurring.

Q. Will you recall, please, exactly what you now remember was the first thing said by you or either

(Testimony of John M. Storkerson.)

of the Montgomerys when you came into the office after the usual salutations or greetings?

A. I have a recollection of Mr. Fred Montgomery, I believe, asking me what this cancellation was all about.

Q. That is the first thing you remember?

A. That is the first thing I remember.

Q. But you, as a matter of fact, remember that in no uncertain language, which I do not desire to use at this time, that Ray Montgomery said to you, "What the blank blank do you mean stealing my employee in Los Angeles, Hawkins?"

A. I don't remember that as being his opening statement.

Q. Was that statement at near the opening of the conversation?

A. It could have been; I don't know. [100]

Q. Was it made at all during any part of the conversation?

A. That specific statement?

Q. No, sir; to that effect; substantially, in other words?

A. I remember something of the sort.

Q. What did he say?

A. I don't remember beyond the inference that we had taken Hawkins.

Q. Was it an inference or was it a direct charge?

A. It may have been a charge; I don't remember.

Q. Didn't it impress you at the time?

A. No.

Q. What did you say when he accused you of having stolen Hawkins, if you recall? By "he" I mean Ray Montgomery.

(Testimony of John M. Storkerson.)

Mr. Doyle: What is that question?

Mr. Christin: By "he" I mean Ray Montgomery.

Mr. Doyle: What is the question?

Q. (By Mr. Christin): Just what did you say when Ray Montgomery stated something pertaining to your having stolen or taken away or caused Mr. Hawkins to leave their employ? What did you say?

Mr. Doyle: Just a moment, please. If the Court please, this interrogation goes beyond the scope of the direct examination. It is directed at the question of the cross-complaint, as to which I have a motion to dismiss on the ground that it fails to state a claim.

On direct examination there was no inquiry made with respect to the employment by the Plaintiff Fenwal. That interrogation [101] is open to Mr. Christin in presentation of his own case; it is not open to him on the Plaintiff's case in chief.

Mr. Christin: If Your Honor please, I have practiced some 30 years.

The Court: So have I. The objection is overruled.

Mr. Christin: The conversation, please.

The Court: Answer the question.

The Witness: If I may have the question again.

The Court: What was said to you about Hawkins—stealing Hawkins?

A. I don't remember what I replied to that.

Q. (By Mr. Christin): Well, may I ask you if

(Testimony of John M. Storkerson.)

you recall just about how long in time—five minutes, ten minutes or twenty minutes was spent on discussion of the Hawkins situation?

A. I don't remember.

Q. I want to get from you specifically your best recollection of what was said by you, Fred or Ray Montgomery with reference to the Hawkins situation that day, as you now recall it?

A. As I recall it, at the outset when the first remarks were made by one of the Montgomery brothers regarding Hawkins, I suggested that we defer that discussion until later during our discussions. As I recall, we didn't lengthen it at that particular moment or time.

Q. Did you at that time state to them, "Yes, we have hired Hawkins"? [102]

A. I did not.

Q. You did not. Did you deny that you had hired Hawkins and state "No, we didn't hire Hawkins"?

A. I told them that we didn't hire Hawkins during that conference; I don't know whether it was at that particular time.

Q. I mean during these two days?

A. I told them during these two days that we hadn't hired Hawkins.

Q. Did you at that time know that Hawkins had resigned on the 1st of January or 2nd of January?

A. I was aware of it.

Q. Did you discuss that situation: You knew

(Testimony of John M. Storkerson.)

that Hawkins had resigned, at the time of that conference?

A. As I recall—I don't know whether we did; I think that was probably brought up by Montgomery Brothers.

Q. Well, that is all you recall was said about Hawkins, anyway You have told us everything you remember?

A. That is all I remember at the moment.

Q. Do you remember whether the letter Exhibit No. 8 was handed to Montgomery Brothers or one of them before or after the Hawkins episode?

A. The letter—may I see the letter?

Q. Yes, certainly.

Mr. Doyle: Show him the letter please, Mr. Christin.

Mr. Christin: Oh, yes, I beg your pardon. (Handing paper [103] to witness.)

A. I don't remember whether it was handed him before or after. As I recall, it was early in the day.

Q. Did you just pull out the letter and say "Here is a letter from Dr. Walter"? Or were there any preliminaries in the conversation before you handed them this letter, Exhibit 8?

A. My best recollection—

The Court: Let me read it while you have it in your hand. Go ahead with your answer.

A. My best recollection is that I produced the letter based on the questions of Montgomery Brothers as to what the cancellation was all about.

Q. Which one said that, do you remember?

(Testimony of John M. Storkerson.)

A. I don't remember which one.

Q. Well, what did you say?

A. I said "This is Dr. Walter's letter" and then I produced the letter and gave it to them to read as being an answer to their question.

Q. Then was there a suspension or lull in the conversation while they read the letter?

A. There was.

Q. After they had read the letter, tell us your recollection of what was said by them and by you with reference to the letter.

A. Well, I recall that they questioned the letter. They tried to find other reasons for the cancellation. I think there [104] followed a discussion of their business relations with Fenwal.

Q. Well, with reference to the first paragraph: "We see no reason why you should be surprised by our action, as we have repeatedly brought to your attention the fact that we have not been satisfied with your representation of us in the territory covered by our agreement." A. Yes.

Q. Was that discussed?

A. I don't remember at the moment.

Q. Well, in substance, didn't Mr. Fred Montgomery say "What do you mean? We took you from only \$20,000 in '42 and now you have sales of \$265,000 to \$270,000, what do you mean, our representation wasn't satisfactory?" Was something like that said?

A. There could have been something like that

(Testimony of John M. Storkerson.)

in effect. I don't remember exactly what he did say.

Q. In other words, tell me now your best recollection of what he did say about it, either Fred or Ray.

A. That was a very—he spent some time pointing out the build up in business by the Montgomery Brothers. I tried to point out some of the story, that basically an awful lot of that credit was due to the war; it was due to the work being done by others which he was giving no credit to, by our own engineers. We had other representatives in other areas who had aircraft accounts; that we appreciated the increase in business. [105] And it was that nature of conversation I think went on for some time. That was the essence of it. And I ultimately told him that I hadn't come there to argue that point anyhow; I had come there to try to work out a termination agreement with them.

Q. With reference to the next sentence, "Our requests and suggestions for improvements have been almost entirely disregarded by you, and we have been reluctantly forced to the conclusion that the termination of our relationship is essential." Was the thought conveyed in that sentence discussed by you at that time with them or either one of them?

A. I don't remember, because I don't remember their ever quoting parts of that letter. They—as I recall, they took a general attitude on the entire

(Testimony of John M. Storkerson.)

letter; I don't think they picked out any particular segment, as I recall.

Q. You had read the letter before presenting it?

A. I was aware of what was in it.

Q. Did they ask you to tell them a single instance that you yourself knew where they had been accused of disregarding suggestions and requests that day? Was that discussed?

A. If it was, I don't remember; possibly it was.

Q. What is your best recollection of what was said about that?

A. I'm sorry; I don't remember.

Q. Now tell me, please, what was said about this so-called arrangement to straighten this thing out. As I understand it, there were two suggestions maintained by both sides: One, you [106] stated, I believe, that you said you came there for the sole purpose of discussing an adjustment of their profits to be made during the termination period, and they, on the other hand stated "No, we wanted to discuss a double affair here; we want to talk about discounts—I mean profits in this period of time; we want to talk about the right to maintain a part of this territory." Now, will you tell me just exactly what was said about that between you people, as you now understand, on that day?

A. When I came there, it is my best recollection that I told them that I was there for the purpose of arranging a termination. I further told them that I was also there to work out arrangements on orders with the aircraft companies and so forth, and as-

(Testimony of John M. Storkerson.)

signments. I did not tell them that I was there for the purpose of entering into a contract with them or making any future arrangements on the northern territory.

Q. Well, at that particular time didn't you tell them that you had no power to enter into any contract; that you would have to bring back to your principals whatever was said there for their final approval?

A. Much later in the discussion.

Q. During the discussion you did say that whatever you were talking about there, you weren't empowered to make a definite commitment; it had to be taken by you back to your principals for their approval, in substance?

A. To the best of my recollection. [107]

Q. What did Montgomery Brothers ask you as a concession? What did they want in order to straighten this thing out?

A. In substance, as I understood it, they were prepared to work out a definite termination agreement with me on the basis of the terms that were outlined by Mr. Fred Montgomery, as I recall; and I said that I would be willing to consider negotiating a sales agreement for the north. That is all.

Q. At any time in that conversation did either of the Montgomery Brothers tell you that they would settle or adjust the profit situation on a percentage or fractions period unless there was tied to that some other agreement by virtue of which

(Testimony of John M. Storkerson.)

they would remain your representative in other parts of the territory excepting Los Angeles?

A. I clearly had told them that those two transactions were complete and distinct and one had no bearing on the other; that the first thing that was to be done was the contract termination settlement. And it was in answer to that they asked me if I would be agreeable to certain terms on the cancellation. Nothing at that moment was said——

Q. Right on that exactly, “Nothing at that moment was settled”? A. Said.

Q. Said. All right; about what?

A. About the contract in the north.

Q. You say when you left San Francisco to go to Los Angeles there was a definite agreement which you claim that he did not [108] regard or disregard it in Los Angeles. Tell me, what was the agreement when you left San Francisco?

A. The agreement was before I left on the second night—I believe I called our plant on two occasions, one upon the evening of the first night, in which I outlined the potential terms of termination. I called them on the second night to concur, as I recall, in my actions.

As I clearly understood it, I left San Francisco with a termination agreement, and that I had only and separately said that I would agree to negotiate a new contract.

Q. Did you understand when you left San Francisco that the Montgomery Brothers had said,

(Testimony of John M. Storkerson.)

“Sure, we are going to waive our profits for a certain period and will not require——

A. As consideration——

Q. ——as part of that agreement that we get some of the territory? A. No.

Q. Is that your understanding?

A. May I have that question again?

Q. Was that your understanding when you left San Francisco that either of the Montgomery Brothers had said, “Surely, we will take part of those profits during the six months period,” or did they say “We will adjust our profits provided that we get some of the territory”?

A. They did not at San Francisco state to me that they would [109] require—that they would have to have a contract in addition to the other.

Q. What was said about the retaining of any of the other territory at that conference? What was said about that?

A. What was said about it was the fact that in our discussion I had outlined originally to them certain terms, and they came back to me with certain terms. We discussed the probability that they could have everything they wanted with the exception of a very few thousand dollars on the total.

Q. You made some terms; they came back with some terms?

A. Right; which I said were agreeable.

Q. That was about profits, you say, only?

A. About the termination, and it also involved transfer of orders in the southern territory.

(Testimony of John M. Storkerson.)

Q. Now when the contract was prepared to send here—I mean the exhibit—in February, 1949, Exhibit No. 10, which I show you, it, as a matter of fact, did provide for the territory which they were to retain. (Handing paper to witness.) Did you read it? Is that right? Look at the contract. Doesn't it provide that they have all the territory excepting Southern California?

A. Are you referring to a letter of February 4th?

Q. I am referring to the contract.

A. Of February 9th?

Q. Exhibit 10. Read the contract, the first part, territory covered. [110]

A. Territory covered?

Q. Yes.

Mr. Doyle: You mean the proposed contract in that letter?

Mr. Christin: It says "Agreement."

A. This proposal says that "Exclusive franchise of territory as follows: The State of California lying north of the Counties of San Luis Obispo, Kern and San Bernardino, and the States of Washington, Oregon, Idaho, Western Montana, Nevada, Utah and the Territory of Alaska."

Q. Now, as you read that, they had the representation under that proposed agreement of Washington, which includes Seattle, I take it, or Boeing?

A. It would interpret that way.

Q. As I take it, the only thing excluded from that contract is south of the so-called Tehachapi?

(Testimony of John M. Storkerson.)

A. That I wouldn't know.

Q. You wouldn't know about the Tehachapi?

A. I don't know California geography.

Q. It states "The State of California lying north of the Counties of San Luis Obispo, Kern and San Bernardino." You don't know where they are?

A. I have an idea.

Q. However, reading this agreement, it means to you that under this proposed agreement—this was in February after the other conversations, it excluded all that territory south of San Luis Obispo, Kern and San Bernardino; for your information I will [111] tell you that Los Angeles is south of that line.

A. Yes.

Q. You were in favor of accepting that when that contract was prepared?

A. Yes.

Q. In that conversation what was said by you with reference to carrying on sales activities after January 24th?

A. I said that we intended to set up our own office in Los Angeles.

Q. When? When did you contemplate setting up that office?

A. When?

Q. Yes.

A. At the close of termination of the Montgomery Brothers.

Q. My question was, what activities were anticipated or were discussed so far as selling was concerned during this termination period? What was everybody going to do?

(Testimony of John M. Storkerson.)

A. Well, I proposed that we would set up an office; we intended to have a——

Q. No, that is after March 1st. I mean January and February, 1945, what was going to be done about carrying on business?

A. In January and February?

Q. Yes.

A. We presumed that Montgomery Brothers would carry it on during the termination period.

Q. What were they supposed to do, carry on the business? [112] A. That's right.

Q. And carry on the same as they had carried on prior to the termination date?

A. Not necessarily. That is what I was there to negotiate.

Q. They were supposed to place orders, weren't they? A. Yes.

Q. They had to carry on activities in Los Angeles and Boeing, to service and contact the airplane trade, didn't they?

A. During the 60-day period, yes.

Q. I now understand you to say that you were going to go out and make sales on your own behalf with your new organization in the months of January and February? A. No, sir.

Q. And what was said about pressing orders, to get all you could in? Wasn't that said by somebody, in those months?

A. Pressing orders and getting all you could in?

Q. In other words, what I am getting at, Mr. Storkerson, during these months of January and

(Testimony of John M. Storkerson.)

February there wasn't going to be a sit-down strike; nobody was going to sit down and do nothing; is that correct?

A. That is right.

Q. What was supposed to be done, as you understood, by Montgomery Brothers during January and February?

A. They were to continue their normal pursuit of orders.

Q. And what do you mean by that? To do [113] what?

A. To solicit orders.

Q. And at that time you had told them that Hawkins was going to work for you?

A. What time?

Q. During this conversation on January 24th?

A. In San Francisco?

Q. Yes.

A. I did not tell them that Hawkins was going to work for me.

Q. When did Hawkins go to work for you?

A. He went to work for us on March 1, as I recall.

Q. All right. With reference to the conducting of the business after January 4th and before March 1, 1949, what if anything was said about contacting the airplane companies in Los Angeles?

A. I'm sorry; I didn't hear the first part.

Q. What was to be done with reference to contacting the airplane companies?

A. In Los Angeles?

Q. Aircraft companies—yes.

(Testimony of John M. Storkerson.)

A. Mr. Ray Montgomery was to meet me in Los Angeles.

Q. What was said about the reason for Ray Montgomery going to Los Angeles at that conference? Why was Ray going down?

A. He was going with me to the various aircraft companies to announce the change of Montgomery Brothers to Fenwal as of March 1.

Q. In fact, didn't you say that you would like to go to the [114] airplane companies, and regardless of your difficulties and argument about Hawkins, you would bury the hatchet and go out with him and you would go together and in substance not let the airplane companies know of any misunderstanding between Fenwal and Montgomery Brothers? Didn't you have that understanding?

A. My understanding was strictly that Ray Montgomery and I were going down to the various aircraft companies.

Q. For what purpose?

A. For the purpose of announcing the change-over to Fenwal.

Q. For the purpose of carrying on sales that they were going to try to make between January 24 and March 1, and for any sales you would make after March 1st; that was the purpose of going down there?

A. The purpose was to make the arrangement clear to the aircraft companies as to how we would operate.

Q. Wasn't it stated there that you would put on

(Testimony of John M. Storkerson.)

a smiling face when you went there and not tell the aircraft companies the reason for this switch?

A. Not tell them the reason?

Q. The reasons for it?

A. I don't remember any such.

Q. Was it then stated that Hawkins was going to be with you to make this contact?

A. At San Francisco or Los Angeles?

Q. Yes. [115]

A. I don't recall what was said about it at San Francisco, but we certainly arranged it in Los Angeles.

Q. Now then, we have got down to Los Angeles about the 26th or 27th of January, is that right?

A. Correct.

Q. And you went to the office of Montgomery Brothers, is that right?

A. I would like to look at that date, if I may. I arrived there in Los Angeles; I met Mr. Montgomery the morning of the 27th.

Q. At his office?

A. No, I can't say; I don't recall that. I think Mr. Hawkins—no, I think I actually met Mr. Montgomery—I can't say whether we met prior to or at his office.

Q. You did meet with Mr. Hawkins and Mr. Montgomery in Los Angeles?

A. At Mr. Montgomery's hotel.

Q. Did you know Mr. Hawkins prior to that time?

A. Yes.

(Testimony of John M. Storkerson.)

Q. When had you last seen Mr. Hawkins immediately prior to that conversation on the 26th or 27th? A. The night of the 26th.

Q. You saw Mr. Hawkins before you and Hawkins and Montgomery met in the morning?

A. I did. [116]

Q. Where did you see Mr. Hawkins?

A. I arranged—as a matter of fact, when I was in San Francisco I had told Mr. Montgomery that I was going to Los Angeles and I was going to see Mr. Hawkins; that I was going to make a proposal to him. Therefore, when I went down I made the arrangement to meet him on that evening.

Q. What do you mean by a proposal to him?

Mr. Doyle: If the Court please——

Mr. Christin: I mean to say the proposal——

Mr. Doyle: Just a minute, please, Mr. Christin. The proposal to Hawkins enters upon the question of the employment of Hawkins. He is referring now to the night of January 26th. That is beyond the scope of the direct examination of this witness and it bears upon the allegations of the cross-complaint. I submit that it is not proper cross-examination and that it is not a part of the Plaintiff's case in chief.

Mr. Christin: My question is not directed to that.

The Court: The objection is overruled.

Mr. Christin: Read the question please.

(The reporter read the question.)

(Testimony of John M. Storkerson.)

A. I was going down to talk over with him the possibilities of his coming with our company, to stipulate as to matters that he was interested in, salary, conditions of employment, and so forth and so on.

Q. (By Mr. Christin): Well then, after having seen Hawkins on [117] the evening of the 26th, now we come to the meeting between Hawkins, Ray Montgomery and yourself at their office in Los Angeles, is that right?

A. The morning of the 27th.

Q. Tell us exactly who was there. Anybody else but those three, you, Hawkins and Ray?

A. At his office, there would be people around his office there.

Q. But nobody else participating in the conversation?

A. I don't remember whether they came into it or not.

Q. What was said that morning?

A. Well, there was considerable discussed, because it took a good deal of time for Ray to go out to the aircraft companies. We talked about where to go and which ones to go to first and what the plans would be for the first day.

Q. Had Hawkins arranged that itinerary before you met him, so far as you know, on the morning of the 27th?

A. For that trip that day?

Q. That trip?

A. Not that I know of.

Q. All right. In that discussion did Mr. Ray Montgomery again manifest what I will say, as you understood it at the time, anger in the presence of

(Testimony of John M. Storkerson.)

Hawkins that you had taken Hawkins away from him?

A. I have no recollection of any anger being displayed at Los [118] Angeles.

Q. Was anger displayed in San Francisco as you now recall it? A. Yes.

Q. By Ray. In Los Angeles do you remember his making statements about Hawkins to you and asking Hawkins in your presence, "What do you think you are doing here after all these years letting us down"? Was that said in your presence to Hawkins? A. I don't remember.

Q. No recollection of that at all?

A. I don't recollect.

Q. You say Mr. Ray Montgomery appeared to be angry to you in the San Francisco conversation. Refreshing your memory, wasn't he angry when he first saw Hawkins that morning with you?

A. I don't know that I remember much about it. As far as I recall, we drove together from the hotel down to Mr. Montgomery's office. I think conversations were purely general, as I recollect them.

Q. At that conversation the first morning in Los Angeles, was any reference made about the dividing of the profits between Montgomery and Fenwal for the months of January and February?

A. That morning?

Q. That morning.

A. I am quite sure on that morning I would have informed Mr. Ray Montgomery that I was having

(Testimony of John M. Storkerson.)

Dr. Walter arrange to write a letter of agreement which we were going to ask him to sign [119] in connection with a division of profits.

Q. I mean, were the details of how it was going to be split up discussed on that morning?

A. I don't recall the details of that particular morning, because it is so strong in my memory, is the discussion which took place later on.

Q. That was discussed later in the week down there?

A. Certainly, it was discussed Sunday morning.

Q. You don't recall it that morning?

A. No, I do not.

Q. The three of you went out to the airplane companies? A. That's right.

Q. Tell me first—or I don't care in which order you take it, the first session at any one of the airplane companies.

A. Frankly, I don't remember.

Q. Well, do you remember the conversation at any one of them without naming them by name?

A. As I remember it, the conversation was fairly much the same in most places. In some places it was very short; some places it was slightly extended.

Q. What was it as you recall?

A. During which Ray would tell the aircraft company of the change to our office on March 1; that we would go along normally until the first of the month, and he hoped to carry on in the north. I think he said something about that. [120]

(Testimony of John M. Storkerson.)

Q. Who said that?

A. Mr. Ray Montgomery.

Q. He hoped to carry on in the north?

A. Yes.

Q. In the presence of the airplane people?

A. That's right. As I recall, he told the aircraft people we were in agreement on the transfer in Los Angeles.

Q. Did he then say, as you understood it, that they would be dealing with Fenwal in Los Angeles but the other companies or allied companies would be dealing with them in the other parts of the Pacific Coast?

A. He said he expected it would work out that way.

Q. So at that time you knew that he expected that out of this deal——

A. When you say "expected" I am not sure.

Q. You heard him say it?

A. I heard him say it, yes.

Q. Did you make any comment when he said it?

A. Not to the aircraft companies, no.

Q. Hawkins was there on that trip?

A. He was with us, yes.

Q. Did Mr. Montgomery or did you tell the aircraft executives you were speaking to at the time, or the production men, that Mr. Hawkins was going to be the new man and they would deal with him in the future? [121]

A. He said that Mr. Hawkins would be taking over March 1st, I believe is the way he put it.

(Testimony of John M. Storkerson.)

Q. In what capacity?

A. I don't remember in what capacity it would be; he would be handling our Los Angeles office.

Q. Didn't Mr. Ray Montgomery in substance say Mr. Hawkins would be manager of Fenwal and all future orders after March 1st would be placed with him or that organization, and all orders prior to that date would be placed with the Los Angeles office of Montgomery Brothers?

A. There is so much in that question——

Mr. Doyle: I have no objection to the question if the witness understands it.

Mr. Christin: I will reframe it.

Q. Didn't Mr. Ray Montgomery, in substance, say that Mr. Hawkins, who had been associated with them would be the new manager or the manager for Fenwal in Los Angeles after March the first and that orders thereafter would be placed by Mr. Hawkins for Fenwal—with Mr. Hawkins for Fenwal in Los Angeles? Did he say that?

A. Words to that effect, as I remember.

Q. And did he say that all orders prior to March first would be placed with the Montgomery Brothers organization in Los Angeles?

A. As I recall, that is correct. [122]

Q. And did you make any comment one way or the other on that?

A. I don't recall commenting directly on what Mr. Montgomery had to offer.

Q. Did you just stand by and say nothing, or did you make some appropriate remarks?

(Testimony of John M. Storkerson.)

A. Comments to the effect that we would do our best to be of service to them, and I told them a little bit what our plans in connection with that office were, and that usually dispensed with the matter.

Q. To revert back for a moment to the conversation in Los Angeles between Ray and Hawkins and you in the office, do you recall that Mr. Ray Montgomery rehearsed to Mr. Hawkins in your presence in substance what had happened in San Francisco on the 24th and 25th? Did he rehearse to Hawkins the substance of what happened in San Francisco? A. He may have; I don't know.

Q. Is it still your testimony you don't recall that Mr. Ray Montgomery at that time stated about the argument and how angry he was at you in San Francisco when he was told that you were going to take over Hawkins? Was that alluded to at all in the Los Angeles conversation?

A. It may have been; I don't recall it.

Mr. Christin: I am going to another topic of the direct examination, Your Honor.

The Court: I was late, so you may take it up now. You may [123] proceed.

Q. (By Mr. Christin): After you went on the tour of the aircraft manufacturers, did you then have other conversations with Ray Montgomery in Los Angeles? A. I did.

Q. I don't care what order you put them in; tell us in substance what was said and who was present at each conversation.

(Testimony of John M. Storkerson.)

A. I saw him on Sunday morning at the close of that week.

Q. Was that the day after you made the last trip to the last aircraft plant?

A. I couldn't tell you that exactly. I remember the one time he told me he wanted to see me at the hotel, I think Saturday afternoon, so I wasn't with him and I met him the following morning.

Q. I take during these trips to the aircraft manufacturers you didn't discuss any of the contractual situations; is that correct?

A. I don't know.

Q. Let us get to the conference in the hotel on Sunday. Tell us who was there.

A. At that conference, Mr. Ray Montgomery, Mr. Hawkins and myself.

Q. And how long did it last?

A. Well, I don't know; I imagine from breakfast until later on in the morning; it may have been several hours; I don't know. [124]

Q. Was Hawkins there during that conversation?

A. As I recall.

Q. Tell us in substance what was said by both you and Ray regarding Hawkins.

A. Ray told me that he—as I recall, he told me something to the effect that he had been in discussion with San Francisco and he wanted to talk to me some more about this termination agreement and the proposed contract for the north; something to the effect he wanted to see those two things settled. He tried to link them together at that point and

(Testimony of John M. Storkerson.)

make one completely contingent on the other. He made the comment, something to the effect that they would be very foolish if they didn't see a new contract and have it in their hands before they let the other agreement made in San Francisco go through, and I charged at that time that that was not fair, it was not in order, in line with what we had done in San Francisco, what we had agreed to, and he denied that there was ever any agreement in San Francisco.

Q. As a matter of fact, as I understand from your testimony, you weren't empowered to make any agreement in San Francisco, were you? You were just getting data to send back to your principals for approval or disapproval?

A. I was in constant—that's right.

Q. Have you told us all you think happened in that conference of two hours? [125]

A. No; he proceeded to add a number of concessions he wished me to make. I thought—I reacted—I'm sorry; he had a number of proposals, changes in it, which I said I would be glad to consider.

Q. Tell us what they were in passing.

A. I think one had to do with the discount arrangement under a proposed contract which he would be interested in. Another had to do with Boeing Aircraft, I think, as I recall. In general, it was going back more in the direction of the previous agreement we had had with him, which I told

(Testimony of John M. Storkerson.)

him under no circumstances in the beginning that we would ever repeat.

Q. I didn't hear the last part.

A. In substance it was going to be more in the direction of the old agreement which we had cancelled, and I recall that I said that they would have the agreement as I had transmitted it as carefully as I could to Dr. Walter—it would be in their hands in a few days, and that I asked him—I said I would appreciate it if they would agree to it and carry through on it, and I on my part was going back in good faith to look into the negotiation of a new contract.

Q. Was anything said there with reference to the method of billing—by that, I mean to refresh your memory didn't Montgomery Brothers tell you in their experience of 30 years they weren't the regular representative of an eastern manufacturer; their way of doing business was that they always bought [126] the material, bought it by exclusive contract representation, and then they in turn would bill to the consumer, differing from the custom of the representative who placed the order and in many instances the eastern manufacturer does the billing? Wasn't there some disagreement about that phase of the new contract?

A. As to that point, I don't remember what Mr. Montgomery on any occasion told me—on that occasion told me, but I recall that I told them that we weren't going to have a buy and resale agree-

(Testimony of John M. Storkerson.)

ment which would be anything like the one that we had previously held and cancelled.

Q. Prior to your making that statement, hadn't Mr. Montgomery, in order to bring up that matter of conversation, stated to you that that would be a "must" in a new contract; in other words, that they would be purchasing and reselling and not dealing on a commission and you billing? Wasn't that what brought up the whole thing, Montgomery saying that?

A. I don't recall that he ever told me that it was a must.

Q. You said that you wouldn't stand for the old procedure—you started the conversation along that line, or did he? A. On the old procedure?

Q. Yes. A. I don't recall.

Q. Somebody did say that the new contract would either be a contract for buying and selling or would have the regular representation [127] with the manufacturer doing the billing; that was discussed, wasn't it? A. It probably was.

Q. What is your best recollection?

A. As I recall, it was discussed.

Q. Was anything said there about cutting down the time for termination from 60 days as it was in the old contract to 30 days in the new contract? Did they say anything about that?

A. Yes, I recall.

Q. What was said?

A. Nothing was said specifically about dating; in fact, if I may change my answer, I don't recall

(Testimony of John M. Storkerson.)

that that particular thing was brought up. I had comments to make relative to termination, but I don't think any specific term was discussed.

Q. I show you again Exhibit No. 10, draft or form of contract that was sent out on November 9th, and ask you——

Mr. Doyle: November 9th?

Mr. Christin: I beg your pardon; February 9, 1949, with a letter, and ask you to read Article 9, and tell me what is the termination period, 60 or 30 days. A. 30 days.

Q. And the original contract of 1944 as modified in 1936 had 60 days? A. Right.

Q. And your recollection is that was not discussed by you in [128] Los Angeles with Ray Montgomery as to whether it would be 60 or 30?

A. As I recollect, I mentioned the termination was different in our standard contracts which we entered into with other representatives.

Q. When you stated the standard contract, did you tell them that your standard contract was 30 days and not 60 days?

A. As I recall, I told them that it was a more—— if I can find the——

Q. Shorter time?

A. I didn't make it in terms of time, but my comment would imply it would be a shorter term.

Q. If you say you implied, what words did you use by virtue of which you think you made that implication?

(Testimony of John M. Storkerson.)

A. I don't remember, except I was aware that he would not be as happy with our discount terms.

Q. When you prepared the second contract you knew he wouldn't be happy when he would get it, isn't that right?

A. I saw no reason why he shouldn't be content with it.

Q. You just said he wouldn't be happy.

A. I said I didn't think he wouldn't be as happy with those particular terms.

Q. Have you told us in substance all that occurred in that room for two hours on that afternoon, as you recall it?

Mr. Doyle: Morning, Mr. Christin—Sunday morning. [129]

Mr. Christin: I thought it was afternoon.

Mr. Doyle: Sunday morning.

Mr. Christin: On that morning or afternoon.

A. It was Sunday morning. As I recall at the moment, yes.

Q. Now then, you went on East, is that correct?

A. Yes.

Q. And the letter of February 4th—

The Court: The Clerk tells me we will have to finish up with the case on the blackboard tomorrow. I would like to serve counsel's convenience. I think we can probably get through in the morning, so we can take it up in the afternoon, or if it is more convenient I can hear you again day after tomorrow morning.

Mr. Christin: Any time.

(Testimony of John M. Storkerson.)

The Court: What would suit you better?

Mr. Doyle: I will suit the Court's convenience, if the Court please. I only have the observation that I have these people here from Boston. I would for that reason like to accommodate them.

Mr. Christin: I desire to ask the Court's indulgence; I have to be in the Appellate Court for about ten minutes; I can't get out of it, on the morning of Thursday, the 13th.

The Court: That will be day after tomorrow.

Mr. Christin: Would it be all right if I came here about 20 minutes after 10:00? [130]

The Court: We will resume then at 2:00 o'clock tomorrow afternoon.

(Whereupon an adjournment was taken until Wednesday, July 12, 1950, at 2:00 o'clock p.m.) [131]

Wednesday, July 12, 1950—2:00 o'Clock P.M.

The Clerk: Fenwal Incorporated versus Montgomery Brothers, on trial.

Mr. Christin: Ready.

JOHN M. STORKERSON

called as a witness by the plaintiff; previously sworn.

Cross-Examination
(Continued)

Mr. Doyle: May it please the Court, I should state for the record that Mr. Christin has produced the original letters of June 13, 1947, and September 17, 1947, copies of which are now in evidence as Exhibits 16 and 19, respectively, and it is stipulated between counsel that the copies may be used instead of the originals so that we do not need to re-mark them.

Mr. Christin: Thank you.

Q. Mr. Storkerson, you were saying yesterday, I believe, that you went out with Mr. Ray Montgomery and Mr. Hawkins in the month of March to see the aircraft manufacturers; is that correct?

A. That's right.

Q. And you saw the production executives at that time?

A. The people that I saw were the ones that were selected as being proper by Mr. Montgomery, and I don't recall what their official capacities were.

Q. On that occasion did you have occasion to refer to Mr. Hawkins, as to why he was there? [132]

A. During the——

(Testimony of John M. Storkerson.)

Q. Any one of these conferences? You said they were all about the same?

A. Yes; during either—that being the March conferences, I had either told Mr. Montgomery or gave him reason to know previously that we had hired Mr. Hawkins.

Q. And had you so advised the executives of these companies you were speaking to on the prior visits you had made with Montgomery and Hawkins in around January 26, 27 and 28?

A. I recall Mr. Montgomery advised the various people to whom we talked that Mr. Hawkins would be with our organization after the first of March.

Q. Do you recall one conversation, I believe it was with Mr. McChesney—what company was that, Douglas or Lockheed?

A. I believe it was Lockheed.

Q. And the conversation that you had with him in the presence of Mr. Montgomery and Mr. Hawkins, do you remember Mr. McChesney saying anything with reference to what Mr. Montgomery thought about you having taken Mr. Hawkins from them in that conversation?

A. As I recall, Mr. McChesney had reference to the change—general change in our operations from the Montgomery Brothers Company to our company. I do not remember that it was specifically directed with reference to Mr. Hawkins or that there was any reference made specifically to Mr. Hawkins. [133]

Q. In substance, refreshing your memory, didn't

(Testimony of John M. Storkerson.)

McChesney say to Ray Montgomery, "Tell me, what do you think about this taking your key man? Is that agreeable to you?" And Mr. Montgomery said, "Well, what can I do about it?" in substance?

A. I don't recall that being said.

Q. Nothing of that kind ever happened to your memory as of this time?

A. You asked me—not of that kind, as I recall; there was a reference made to the general change, but not directly to Mr. Hawkins.

Q. What was said about the general change along those lines?

A. I believe that Mr. Montgomery was asked whether he was happy with the change, and he, as I recall, replied that he wasn't happy, but he was agreeable to it.

Q. Did he state why he wasn't happy at that time and place to Mr. McChesney?

A. He did not, to the best of my recollection.

Q. Now, after you left him that trip—oh, by the way, you had arrived in Los Angeles in March, early March. Did Mr. Ray Montgomery, so far as you know, know that you were coming? Had you told him you would be there in March?

A. I hadn't told Mr. Montgomery I was coming in March.

Q. Did you before speaking to Mr. Montgomery in March and after your arrival in Los Angeles tell Mr. Ray Montgomery that you were going to go and contact the airplane people yourself [134] alone?

(Testimony of John M. Storkerson.)

A. Before talking with him did I tell him?

Q. Yes.

A. I don't understand your question.

Q. In other words, you went to see the aircraft executives before you spoke to Montgomery in Los Angeles in March; is that correct?

A. You mean the Purchasing Agents?

Q. We will call them Purchasing Agents, yes.

A. I went directly to see the people at Lockheed; I hadn't discussed it with Mr. Montgomery on that occasion.

Q. When you got to Lockheed—was that the first one you went to see? A. That is correct.

Q. Whom did you see in Lockheed?

A. I saw several people, among them, as I recall, there was a Mr. Brown—Mr. Neal Brown, of their credit group. There were others I saw; I believe it was Mr. McChesney.

Q. And was Mr. Hawkins with you?

A. I don't remember.

Q. Well, now, that is before Mr. Montgomery arrived at that conference, is that correct?

A. Correct.

Q. Now state to the Court what was said to the people there at that time when Montgomery wasn't there. [135]

A. I advised them I had come for their advice. I explained briefly that the situation was that we had been advised by Montgomery Brothers that they preferred not to pay their bill; that we were

(Testimony of John M. Storkerson.)

faced with a problem of producing materials which we knew that they required in their plant for production schedules, and that we were definitely on the spot because we knew of no way that we could proceed to ship those bills and be paid for them, and that would have made it impossible for us to carry on our business.

Q. Did you at that time ask them to deal directly with you and just by-pass Montgomery Brothers?

A. I did not.

Q. Well, what did you say to them about who was going to place the orders after March 1st at the time of this conference?

A. As far as my discussions with the people at Lockheed were concerned, I merely was there to ask them for their advice.

Q. What advice did you solicit at that time?

A. What we should do.

Q. What did you ask them to advise you, or what problem—

A. The problem was what we should do to make it possible to release shipments to their company.

Q. What did they say?

A. They said that they would—as I recall, it was Mr. McChesney said that he would—that they couldn't have that kind of a situation, and I believe he was going to get in touch [136] with Montgomery, and I don't remember exactly what he said.

Q. You at that time knew that all orders which were to be filled which had been lodged in January and February with Montgomery Brothers, that the

(Testimony of John M. Storkerson.)

contract was between Montgomery Brothers and Lockheed? A. I was aware of that fact.

Q. And so far as you were concerned, you were not a party to that transaction; by that I mean the sale was from Montgomery Brothers to Lockheed, not from Fenwal to Lockheed?

A. The orders were placed between Montgomery Brothers and Lockheed.

Q. That is right. Did you at that time say that you wanted them to not observe that contract with Montgomery Brothers, but to deal directly with you? A. I did not.

Q. Well, did Mr. McChesney in substance say, "I will call Ray Montgomery right away"?

A. I don't remember his exact words.

Q. What did he say?

A. As I recall, he was going to look into it and we would come back to see him on the following day.

Q. Did you wait right there at Lockheed and McChesney left the room and telephoned Montgomery and Montgomery came right out that very day at that very time?

A. That is not true. [137]

Q. You don't remember that?

A. I believe I talked with Mr. McChesney first on Monday. I saw Montgomery on Tuesday, the 8th.

Q. Was that by a prearrangement between you and Montgomery? A. It was not.

Q. You say that Montgomery Brothers refused to pay the February statement which was for the January business, is that correct?

(Testimony of John M. Storkerson.)

A. I advised them as accurately as I could at that time what the situation was. I don't remember exactly what I said. You must remember these conversations took place some years ago—a year and a half, and it is exceedingly difficult to remember the details of your conversations.

Q. When for the first time did you demand that Montgomery Brothers pay the statement for the January deliveries?

A. The first time was when the—the first demand we made was in the series of telegrams which have been put in evidence.

Q. Am I correct in saying then that the first demand was the telegram of February 21st, Exhibit 13 of the Plaintiff?

A. Might I have them all?

Q. You may have them all. Just a moment. I believe they are all here, Mr. Storkerson. (Handing documents to witness.)

A. I believe that the first time that we demanded payment was by this telegram in which—which is dated February 24th, and states that “Unless February 10th payment made by wire to us [138] by February 25th, we must stop shipments.” These wires have nothing to do with it.

Q. I think you are in error, aren't you? Isn't it February 21st when you said, “January payment not received; please wire”—that was February 21st, not the 24th?

A. That isn't the wire that I handed you, Mr. Christin.

(Testimony of John M. Storkerson.)

Q. You claim the first demand you made for the payment was the wire of the 24th?

A. The one I just pointed out.

Q. Now then thereafter and on the 24th you received the wire from them, Exhibit No. 23, is that correct, which states "Contract with you does not provide for payment February 10. If you interfere with contracts with our customers and/or fail to carry out your obligations, including deliveries, we will hold you liable for all damages."

A. Mr. Christin, I would have to see all the wires again in their proper order.

Q. All right, sir. (Handing papers to witness.)

The Court: Have you a question pending, Mr. Christin?

Mr. Christin: Yes, what wire did you receive according to those wires in reply to your wire of the 24th?

A. I'm still trying to get this in order. There are other wires in here that were not supposed to be. It is a question of getting the datings correct. All right. I don't have that wire here. [139]

Q. Just a minute; that is all the wires I find there.

A. I believe I just quoted from it a few minutes ago.

Q. I beg your pardon?

A. I believe I just quoted from it a few moments ago.

Q. Here is another one the Clerk found.

A. Wait a minute; maybe this is the wire.

(Testimony of John M. Storkerson.)

Q. This is March 5th; that is a later one.
(Handing document to witness.)

A. Now if you will please ask the questions, I think I am ready.

Q. What wire did you get in reply from Montgomery Brothers to the one you just read where you say for the first time you demanded payment of the February 10th invoice?

A. I believe it is this wire.

Q. You now hand me Plaintiff's Exhibit 23; that is the one I just read a moment ago: "Contract with you does not provide for payment February 10. If you interfere with contracts with our customers and/or fail to carry out your obligations, including deliveries, we will hold you liable for all damages." Is that the one?

A. Mr. Christin, I told you I'm a little bit confused on this. I want to be sure I have all the wires and straighten them out.

Q. Take your time. I think there are two of the 24th. That confused you, I think.

A. All right; I believe I will stand on the fact that this [140] wire is the one.

Q. The one you just handed me? A. Yes.

Q. You at that time knew, did you not, that Montgomery Brothers had made the commitment to sell to and deliver to the aircraft manufacturers the commitments included in the orders which had been lodged with you? You knew that?

A. We knew that we had orders of Montgomery Brothers; what their relationships were with the

(Testimony of John M. Storkerson.)

aircraft companies was not direct knowledge of ours.

Q. At that time you had lodged with you contracts which had been obtained in the month of January and February up to the 24th?

A. Montgomery orders which were placed with us.

Q. So you knew of their commitments with the manufacturers of airplanes? A. I——

Q. And you knew that the airplane companies needed these particular thermostatic switches?

A. We understood it.

Q. And you realized of course if Montgomery Brothers did not deliver and fulfill, they would be liable in damages, you knew that?

Mr. Doyle: That is a matter of conclusion of the witness upon a proposition of law, and I submit it isn't proper [141] interrogation for that reason.

The Court: He may answer if he knows. He asked him about the damages.

A. I don't believe that I had considered that at the time.

Q. (By Mr. Christin): When you received our wire of the 24th, when the wire stated: "If you interfere with our customers and/or fail to carry out your obligations, including deliveries, we will hold you liable for all damages." Did that mean anything to you at all?

A. Yes, I understood it.

Q. What did it mean to you?

(Testimony of John M. Storkerson.)

A. I didn't go specifically into what was the intent behind those words, but the words speak for themselves, I think.

Q. You did at that time understand it to mean that if you didn't deliver to Montgomery you would be liable in damages and——

A. We didn't——

Q. If Montgomery Brothers didn't deliver to the manufacturers we were liable in damages, and by the same token, if you didn't deliver to Montgomery Brothers you would be liable in damages? Didn't you understand that?

A. The matter of my principal concern at the moment was the fact that we couldn't continue to do business unless we had the money to do business with.

Q. All right. That was the 24th of February, wasn't it?

A. What was the 24th of February? [142]

Q. The time that you couldn't continue to do business? A. That's right.

Q. That was only four days to the 28th of February when the contract was entirely terminated; is that correct? A. Correct.

Q. And that embarrassment for those four days made it impossible for you to continue to manufacture; is that correct?

A. I don't—it made it impossible for us to manufacture?

Q. Yes, or to carry out the commitments of the contract that Montgomery Brothers had?

(Testimony of John M. Storkerson.)

A. The point is, Mr. Christin, we didn't use your date of the 28th; the point was we couldn't continue to ship unless we knew exactly when the funds were coming in.

Q. You said you were embarrassed; weren't able to carry out the provisions——

Mr. Doyle: No, that wasn't the testimony.

Mr. Christin: I am asking him; he can say yes or no.

Mr. Doyle: Have the Reporter read the testimony then.

Q. (By Mr. Christin): Didn't you say that in substance yesterday?

A. Please repeat the question.

Q. Didn't you in substance say by reason of the fact that the money wasn't coming in from Montgomery Brothers it made it impossible for you to carry on your manufacturing?

A. It is difficult for me to remember exactly the words I [143] used, but I think it is obvious we couldn't continue in business indefinitely without assurances we were going to receive funds with which to do business.

Q. In the past there was a time when you owed Montgomery Brothers \$22,000 for a period of time?

A. I don't know the figure; I would have to consult the record.

Q. I show you what appears to be a copy of a letter——

Mr. Doyle: It is in evidence. Why don't you show him the original, Mr. Christin?

(Testimony of John M. Storkerson.)

Mr. Christin: Very well. May 20th.

Q. I call your attention to a letter of May 20th, Exhibit No. 15, and reading therefrom the fourth paragraph:

“From the copies of your statements, which we are attaching, covering our payment of \$19,190.24, from which we took one per cent cash discount that you are objecting to, if you will refer to these statements you will see that on December 31st you owed us \$22,687.79, in January you owed us \$16,183.98, and in February you owed us \$13,371.62.” Were those statements in that letter true?

A. I wouldn't—this is Montgomery Brothers' letter. I wouldn't know without consulting our records.

Q. I see. Have you a reply to this letter of May 20th of Montgomery Brothers? Do you know of a reply that was written?

A. The reply to that particular letter?

Q. Yes. [144] A. I don't remember.

Q. If that is the fact as set up in that letter, did you continue to manufacture in May and June of 1947 in that financial condition? Did you continue to manufacture and carry on business in that condition?

A. We obviously continued through the years.

Q. You left San Francisco about the 26th of January to go South. Did you go by train, plane or automobile? A. I took the Daylight.

Q. And arrived there at what time, approximately?

(Testimony of John M. Storkerson.)

A. It would be in the early evening; that is easy to check; it is the scheduled Daylight train to Los Angeles.

Q. You met Hawkins or Hawkins met you on your arrival?

A. Well, I don't understand what you mean by that.

Q. Did you see Hawkins when you got there on January 26th?

A. Yes, I did.

Q. Where and when?

A. As I recall, he met me at the station.

Q. Had you communicated with him prior to leaving San Francisco when you would arrive?

A. Prior to leaving San Francisco?

Q. Yes.

A. The night I left—right before I left I communicated with him.

Q. By telephone? [145]

A. By telephone, as I recall.

Q. You did meet him that night, the 26th?

A. I met him the night of the 26th.

Q. Did you tell the Montgomery Brothers in your conference that you had with them on the 24th and 25th that you were in contact with Hawkins and were going to meet him before Ray Montgomery got there on the 27th?

A. I told the Montgomery Brothers when I was in San Francisco that I proposed to make an offer to hire Mr. Hawkins. I went—I called Mr. Hawkins; I made arrangements to meet him and I hired him on the evening of the 26th, and on the morning

(Testimony of John M. Storkerson.)

of the 27th the two of us met Mr. Montgomery, and I then told Mr. Montgomery or made it known to him that he had been hired that evening.

Q. And it is your testimony you had had no conversation with Hawkins, or any other member of your corporation, prior to the evening of January 26, 1949, wherein there was a discussion of this employment or proposed employment of Hawkins? No conversation of any kind?

Mr. Doyle: Just a moment. I don't understand the question.

Mr. Christin: Strike the question; reframe it.

Q. Is it your testimony that prior to January 26, 1949, neither you, nor so far as you know, had any officer of your company, had conversations with Hawkins which had appertained [146] to his employment by Fenwal?

Mr. Doyle: Let him tell about his own conversation, not about conversations that other people may have had, Mr. Christin. We will object to the question as calling for testimony of this witness about conversations that other people may have had.

Mr. Christin: I think it is admissible; I will bring it down,——

Mr. Doyle: It is compound.

Q. (By Mr. Christen): Did you yourself have any conversations with Hawkins covering the matters included in my last question?

A. I did.

Q. When and where?

A. The conversations were entirely by telephone.

(Testimony of John M. Storkerson.)

They took place on datings which I cannot remember, but which were around the first of the year, 1949.

Q. Did you have a long conversation—by that I mean many minutes—with Hawkins on the 31st day of December, 1948, from Ashland?

A. On the 31st day of December?

Q. December, '48?

A. I don't remember the exact time; I had a conversation with him approximately—I had conversations with him.

Q. And what were those conversations?

A. Do you wish me to give the essence of the conversations?

Q. I do. [147]

A. Mr. Hawkins, in calling me, told me that he had heard that we had sent a cancellation notice to Montgomery Brothers. He asked me if he had had anything to do with it. I told him no, that he had had absolutely nothing to do with it. He wanted to know how he would fit in the picture, was he going to be given an opportunity to come to work for Fenwal.

Q. I didn't get that last sentence.

A. Was he going—in essence, he asked me if he was going to be given an opportunity to come to work with Fenwal. And I told him at that time that I was going to make absolutely no commitments to him whatsoever, and that I was going to see Montgomery Brothers in San Francisco, and

(Testimony of John M. Storkerson.)

after I had seen them I would be glad to talk with him. That is the essence of the conversation.

Q. He asked you if there would be an opportunity for him to work with or for Fenwal; is that correct?

Mr. Doyle: Just a moment, please. This line of interrogation is obviously directed to the employment of Hawkins by Fenwal. That is the subject of the cross-complaint to which I have previously referred. It is not within the complaint or the answer. It was not inquired into on the direct examination of this witness. It is not a part of the Plaintiff's case in chief nor of the Defendants' defense thereto. I submit, therefore, that it is improper interrogation at this time, and before that matter is inquired into in the regular [148] course of the proceedings, as I assume it will be, I should like to be heard on the motion to dismiss the cross-complaint.

The Court: I am going to decide the cross-complaint when I pass on the merits. I think I had just as well hear this now, Mr. Doyle.

Mr. Christin: The question, please, Mr. Reporter, through the Court.

. (The Reporter read the question.)

A. For Fenwal, yes.

Q. (By Mr. Christin): You realized the amount of business that was being done by Montgomery Brothers in Fenwal's products in the year 1948 in this area, didn't you? I mean the Pacific Coast?

(Testimony of John M. Storkerson.)

A. In general terms, yes, sir.

Q. And you had given notice of termination on the 31st day of December—29th day of December, 1948, is that not true?

A. On the last day of December of 1948, yes.

Q. Is it your testimony that when you mailed that letter of the 29th, terminating the contract in 60 days, that you had no definite arrangement for anybody to take over that business on the Pacific Coast as of the 1st of March?

A. With anybody outside of our own company or any thoughts along that line we may have had, with this exception; we had absolutely no discussion of that matter——

Q. I am asking you, so far as you were concerned, when you sent [149] that letter you had no one definitely in mind to carry on operations after the effective date of the termination?

A. We had no one definitely in mind?

Q. That's right.

A. Yes, I believe we had hoped that it would be possible to secure the services of Mr. Hawkins after I talked with Montgomery Brothers.

Q. After you had talked with Montgomery Brothers? A. Yes, sir.

Q. Did you tell Montgomery Brothers in the conference on the 25th—the 24th of January, 1949, that you had had these telephone calls with Hawkins in the latter part of December, 1948? Did you tell them that in your conference with them?

A. I don't remember that I did so.

(Testimony of John M. Storkerson.)

Q. You don't know whether you did or not?

A. I don't remember.

Q. Did you write them any letters of any kind telling them of your negotiations or conferences or conversations with Hawkins pertaining to his employment by you?

A. Did I write to Montgomery Brothers?

Q. Yes. A. No, sir.

Q. On about the 25th of May, 1948, did you have a sales meeting at Ashland, Massachusetts?

A. In May of '48? [150]

Q. Yes.

A. Yes, sir, it was about that period, as I recall it.

Q. Did you attend that? A. I did, sir.

Q. Was Mr. Walter, your President, there?

A. He was.

Q. And Mr. Robinson? Who is Mr. Robinson in your organization?

A. Mr. Robinson is our Sales Manager.

Q. Did he attend that meeting?

A. He did, sir.

Q. What was the purpose of that meeting?

A. The purpose of that meeting was simply to gather together representatives of our company from all over the country to further their knowledge of our products and the application of the product in order to help them in their selling effort.

Q. And did you know at that time that Mr. Hawkins had been requested to come to that sales meeting by your organization and deliver a paper

(Testimony of John M. Storkerson.)

which in substance was called "Applicability of Thermostatic Switch Control to Airplanes"?

A. I wasn't part of the group who made up the schedule. Of course it was obvious that I knew he was giving the paper when he was there.

Q. Did he give such a paper?

A. It is my understanding. [151]

Q. Did you hear him? A. I did not, sir.

Q. At that time you were General Manager?

A. Yes, sir.

Q. Did you at that time believe that Hawkins was qualified to give a paper on that subject to the other salesmen or to the other representatives of Fenwal at that time and place?

A. I didn't know Mr. Hawkins prior to that time. I had no way in which I could judge his ability to give such a paper.

Q. Who in your organization, so far as you know, would have extended that invitation to speak?

A. Presumably it would be done by our sales organization under Mr. Robinson.

Q. Now, following that meeting or about the time of that meeting did you have any program with the other executives to promote and enhance the sales of your products through your representatives to give them a good sales talk to increase their sales?

A. We had a program in which we discussed with the salesmen information which would help them sell better.

Q. By salesmen, you mean representatives?

(Testimony of John M. Storkerson.)

A. Representatives.

Q. Among which were Montgomery Brothers?

A. That is correct.

Q. At what capacity was your plant operating in May, 1948? [152]

A. That is a very difficult thing to state accurately. It was low.

Q. Was it 25 per cent?

A. I think it was probably higher than that; I think it was probably more on the order of 50 per cent, but I don't recall.

Q. As General Manager did you keep conversant with the purchase orders and sales made by Montgomery Brothers in this territory? Was that in your duties? A. It is not in my duties.

Q. You at no time then knew how Montgomery Brothers were progressing so far as sales were concerned, or purchases? A. Only in general.

Q. Would you know whether it was good or bad?

A. At that time I may have. At this particular time I don't recall.

Q. I call your attention to an inter-office communication of Fenwal Incorporated dated May 25, 1948, and ask you if that was uttered by your Mr. Robinson?

Mr. Doyle: You mean you are asking if that is Mr. Robinson's signature?

Mr. Christin: No, if it was prepared and sent out by Mr. Robinson in the ordinary course of business?

(Testimony of John M. Storkerson.)

A. Looking at his signature, it is apparently his letter.

Mr. Christin: I will offer it in evidence and ask that it be marked next in order. [153]

The Clerk: Defendant's Exhibit A in evidence.

(Letter, Fenwal to Montgomery, May 25, 1948, marked Defendant's Exhibit A in evidence.)

DEFENDANT'S EXHIBIT A

Inter Office
Fenwal Incorporated
Ashland, Massachusetts

Date: May 25, 1948
(dic. 5-24-48)

To: Montgomery Brothers—San Francisco
From: Mr. C. J. Robinson
Subject: Sales Conference

Attention: Mr. F. H. Montgomery

We put Edgar and Dick on the train Sunday afternoon. It was certainly a pleasure to have them with us. Saturday afternoon, we had a long discussion of some of our mutual problems. I made notes at this conference, and the purpose of this letter is to give you full information.

Both Edgar and Dick were quite concerned about the work which we are doing at Wright Field. They felt that we were not succeeding in our endeavors as yet, to the point where we are getting our fire

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

detectors recommended to aircraft companies. I am not going into a long discourse on what we are doing. This has been given in detail to both Edgar and Dick. I think when you discuss the matter with them you will find that we have done a lot more at Wright Field than anybody realized.

But in order to assist us in our work at Wright Field, we again requested that Edgar and Dick get the aircraft companies in your territory to write to Wright Field requesting approval of our fire detectors. We further requested that if the companies wrote to Wright Field for this approval, Edgar and Dick be shown copies of the replies. This is most important because, in accordance with procedure at Wright Field, the word "approval" or "disapproval" must be used—not words such as, "We recommend the use of * * *," or "We suggest the use of * * *." Edgar can explain this to you. Without your help in getting these letters written and copies of replies sent to us, if possible, we have no evidence to present at Wright Field. I can assure you that with this evidence, I can turn the place upside down.

As an alternate, if such letters of approval cannot be written, we asked that Edgar and Dick ask to see copies of present correspondence received from Wright Field which may say, "We recommend, (or suggest) the use of (Fenwal detector) or (Silverwin detector)." If such letters are shown to them, they are to see if they can obtain copies. If not, they are

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

to make note of the date of the letter, the code number on the letter from Wright Field, the sense of the wording contained therein and the name of the person writing the letter. Even with this information I can go to Wright Field and insist on seeing a copy of the letter. I have done this before; I know I can do it again. You get the facts as requested. I can assure you I will take care of the rest.

We agreed as we have done in the past to furnish you with all information regarding our transactions at Wright Field wherein it is possible to do so, so that you will be fully advised of all that transpires.

On to another subject. We agreed with Dick Reed that we would keep him constantly advised as to the information obtained from transactions at Boeing, Wichita, and Dick was apparently of the opinion that Fraser D. Moore was not quite competent to handle work at the Boeing, Wichita plant. This, of course, is not so, and after discussing the matter with Dick, I think he feels entirely differently about it. F. D. Moore is competent and is well liked at Boeing, Wichita. The purpose of this discussion was to make certain that the proper liaison is maintained among Montgomery Brothers, F. D. Moore, Fenwal, Boeing, Seattle, and Boeing, Wichita.

Edgar advises that he and Ray have discussed a resale project of our switches with Douglas. Edgar agrees that, immediately upon his return, he will write up a report on this tentative discussion which

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

was held recently, and hopes that by that time, he will be able to furnish us with Douglas's intended prices for our review.

Dick Reed discussed recent tests run at Boeing on our compression type Thermoswitch which they have received. We told Dick that we had had some trouble with these Thermoswitches changing temperature setting when exposed to periods of overshoot, and realizing this, we have changed the design somewhat to incorporate the aircraft fire detector end assembly. With this feature, we have been able to make a Thermoswitch which is extremely remarkable in its repeatability in operation. Dick has a report of a test conducted on two of these Thermoswitches on Saturday. You will get copies of this report from him. For your information, we have manufactured and tested 200 of these new type compression Thermoswitches, and have made shipments of these to both Douglas and Boeing. Both Edgar and Dick will take the matter on from there. All compression Thermoswitches being manufactured at present incorporate this new feature.

Both Dick and Edgar felt that if they could do some work at Wright Field, it might assist all of us. However, we do not believe that this is your responsibility, nor do we believe, under the present circumstances, that this should be permitted. Edgar will give you the reasons why. We did, however, agree to permit Dick Reed to go to Wright Field and meet the Project Officer on the XB-47. Dick

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

will take care of this. We have specifically requested that he stay away from the Equipment Laboratory and his approach to the Project Officer is to be that he is traveling through Dayton on his way to the West Coast, that he is the Fenwal representative at Seattle, that he wished to make the acquaintance of the Project Officer, etc.

In line with this, we have asked Dick and Edgar to furnish us with the names of all the Project Officers at Wright Field handling experimental aircraft on which you are trying to get Fenwal Thermoswitches and Fenwal Fire Detectors specified. With this information, we too can contact these Project Officers.

Ed Poitras showed both of the boys a new terminal type Thermoswitch which is in development. Either one of them can describe this to you. It is not ready for release at present.

Edgar Hawkins very kindly brought with him another Silverwin fire detector. We are going to send to him directly, at Los Angeles, another Room Thermoswitch. We will continue tests on this Silverwin detector and furnish a complete report to you.

Edgar advised that he was going to stop at Lake Muroc and do one day's work and see what was going on and what further information he could pick up. He is to write us a complete report on this visit.

I know that you can appreciate the seriousness

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

of this aircraft program. It requires close work between Montgomery Brothers and Fenwal. We, therefore, have requested that Edgar and Dick furnish us periodically reports of their visits to the aircraft companies. These do not have to be detailed, but we do like to know what is going on in order that we can offer suggestions and assistance. Both of the boys have agreed to writing these reports. We trust that you will stand back of their decision.

Dick Reed wanted four samples of a rate-of-rise Thermoswitch for use in connection with the Boeing heater problem. He intends to apply them, as has Edgar, on the DC-6 tests. However, the decision to give these samples to him depends somewhat upon Ed Poitras' opinion. I must be brief in this since Ed Poitras has all the facts as he spent all Saturday morning discussing this problem with Dick and Edgar. More information on this later. If Ed Poitras feels the samples should be forwarded, you will, of course, get a full report on the decision.

I spent some time talking with Edgar and Dick about the allocation of their selling time to aircraft companies. We feel that the volume of business to be obtained from aircraft manufacturers is extremely high. I am not going into detail regarding this matter because I went over it with Ray when he was here. Regarding the intended proposal which Edgar discussed with me relative to increased compensation for sales to the aircraft industries, it

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

is our decision that this proposal cannot be entertained under any circumstances, and that our present agreements for compensation are to stand until such time as I have had the opportunity of further reviewing the matter as agreed between Ray and myself. Please remember that since Ray's visit, I have been completely tied up with the Sales Conference. Within the next two weeks, I will write you more fully regarding this subject.

I think both of the boys learned a lot during their visit. They certainly returned with their pockets loaded with samples. We all had a good time. I wish both you and Ray could have been here. The theme of the Sales Conference was, naturally, "more sales," and when we say more sales, we mean more diversified sales, sales in small quantities and more sales in volume quantities.

The factory, at present, is operating at 25% capacity. We have marvelous equipment and facilities for operating at 100% capacity. We sincerely wish more business, and intend to expend our every effort in giving you cooperation and service.

Very truly yours,

FENWAL INCORPORATED,

/s/ C. J. ROBINSON,

Sales Manager.

CJR:dd

Received May 27, 1948.

[Endorsed]: Filed July 12, 1950.

(Testimony of John M. Storkerson.)

Q. (By Mr. Christin): Reading from the last paragraph thereof as follows:

“The factory at present is operating at 25 per cent capacity. We have marvelous equipment and facilities for operating at 100 per cent capacity. We sincerely wish more business, and intend to expend our every effort in giving you cooperation and service.”

You knew that that was the policy of the company at that time, is that correct?

A. That is right.

Q. It is true, is it not, you were operating at that time at 25 per cent capacity?

A. That is an approximate figure; it could be figured several ways.

Q. At that meeting did you meet Mr. Fred Montgomery and Mr. Ray Montgomery in May?

A. I believe not.

Q. Did you meet Mr. Hawkins?

A. I met him, yes.

Q. Now, then, did you at that time know—I mean in May, 1948—the sales situation for the month of May, June, July, August and September—no, strike that.

Did you in May know what sales had been made by Montgomery [154] Brothers in April of 1948?

A. I'm sorry; may I have the question?

Q. Did you at the May meeting know the sales that had been made in April of 1948 by Montgomery Brothers?

(Testimony of John M. Storkerson.)

A. In May? I may have at that time; I don't remember.

Q. Did you know that business generally was not so good in the United States at that time—your business?

A. As a matter of fact, as I recall, I think that our business was—I know that our business was—May I rephrase that? I know that at that time business in general was not as good as it had been previously, because it was after the war.

Q. And that is one of the reasons why that program was carried out with the salesmen to pep up sales?

A. That is correct.

Q. Now, if these figures are correct that the April sales for Montgomery Brothers in 1948 were \$14,600, in May they were \$14,787, in June they were \$23,204, in July they were \$10,772, August \$8,359, September \$36,450, October \$34,600, November \$34,000, and December \$34,400, did you know of that uptrend in business as it was being reflected by your books or by your reports, as the General Manager?

Mr. Doyle: Pardon me, Mr. Christin. Is it your statement that those figures you have read were the Montgomery sales——

Mr. Christin: That is right.

Mr. Doyle (Continuing): —— to its customers, or the Fenwal sales to Montgomery in those [155] months?

Mr. Christin: Those are purchases from——

Mr. Doyle: Purchases from Fenwal?

(Testimony of John M. Storkerson.)

Mr. Christin: That is correct.

Mr. Doyle: And you are asking this witness whether he knows that is the fact?

Mr. Christin: Yes, as those sales were reflected in those months. Were you aware of that fact as General Manager?

A. Yes, because—I believe I am aware of it because it is exactly in line with the activity in the aircraft industry.

Q. Exactly so. Now, the purchases by Montgomery Brothers in those months constituted a large part of your production?

A. A substantial part of our production.

Q. When you use the word “substantial” can you reduce that to a fractional basis?

A. It would vary from month to month; sometimes I may say it was a quarter. It might vary.

Q. In other words, in your opinion, at that time in those months as the General Manager, was that business satisfactory in this area?

A. It depends on how you mean the question. If you mean by that, Mr. Christin, were we satisfied that that amount exhibited particular effort on the part of Montgomery Brothers, I would say no.

Q. But it was a substantial increase, wasn't it, from \$8,000 in August and \$10,000 in July to \$36,000, \$34,000 and \$30,000 [156] for the months of September, October, November and December, wasn't it?

A. Yes.

Q. Did you have any discussion of any kind or character with Dr. Walter in the month of Sep-

(Testimony of John M. Storkerson.)

tember or prior to the middle of September, 1948, as to his coming West on a trip?

A. I may have; I don't remember.

Q. Well, did Dr. Walter come West on a trip in September?

A. It is my understanding that he did.

Q. It was to attend a medical conference in Los Angeles, was it not?

A. I'm not personally familiar with the situation.

Q. Was he on a business trip or was he here as a Harvard Professor in Medicine to attend a medical convention in Los Angeles?

A. I believe he told me some medical meeting.

Q. Do you know a Dr. Charles Hafnegal?

A. No, sir.

Q. Did Dr. Walter and you discuss the advisability of Dr. Walter meeting, seeing Mr. Hawkins in Los Angeles to have some conversations with him about future plans of Fenwal on the Pacific Coast?

A. As I recall, Dr. Walter mentioned that he would like to see Mr. Hawkins. The balance of his conversation I don't remember. [157]

Q. As General Manager, didn't you discuss with him why did he want to see Mr. Hawkins?

A. No, sir, I don't believe so, because it would be very perfunctory in the various cities he has gone to; he has been our representative many times.

Q. When Dr. Walter returned—how long was that trip? A. I don't remember.

Q. Could you approximate when he got back?

(Testimony of John M. Storkerson.)

A. I can't remember that, sir.

Q. Would it be in September or October?

A. I wouldn't know, sir.

Q. When did you next see him that year after September?

A. I couldn't tell you, sir. I don't think that he was gone too long. I saw him when he came back from the trip; I can't personally place when the trip was.

Q. Do you have a directors meeting monthly?

A. Yes, we do.

Q. Do you recall whether he was there on the October meeting?

A. No, sir, because we had continued meetings.

Q. When he came back did he tell you that he had seen Mr. Hawkins in Los Angeles on two occasions where he had long conferences?

A. He told me he had talked with Mr. Hawkins.

Q. What did he tell you he had talked to Mr. Hawkins about?

A. He had talked with Mr. Hawkins, he told me, as I recall, he [158] had talked to Mr. Hawkins about the situation on the West Coast business.

Q. Did he tell you that he had told Mr. Hawkins during those conferences in Los Angeles that Fenwal was going to cancel out Montgomery Brothers?

A. He didn't tell me that, sir.

Q. Didn't he tell you at all or anything that he had in substance asked Edgar Hawkins what would be the best way to conduct the business on the Coast after you had cancelled out Montgomery Brothers,

(Testimony of John M. Storkerson.)

either by employment or as an employee or as a representative of the factory the same as Montgomery Brothers? Didn't he report anything of that kind to you at all?

A. He, as I recall—I remember he told us something about the—he told us that he had had discussions with Hawkins about the situation on the West Coast.

Q. Well, what did he say? What kind of discussions? What did he talk about? Weren't you interested as General Manager?

A. He said that he had questioned Mr. Hawkins on what kind of coverage we were getting and how much activity was being spent on behalf of Fenwal and by what people.

Q. Did he tell you anything about having told Hawkins that you were going to terminate as of 60 days after January 1, 1949, or December 30th?

A. Dr. Walter said nothing to me about advising Hawkins we were going to terminate. [159]

Q. Did he in substance tell you this: That he asked Hawkins for suggestions as to what should be done on the Pacific Coast and that he asked Hawkins about—he told Hawkins about the tentative plans that Fenwal had to set up representatives, manufacturers representatives, and that Fenwal was looking for accounts and that he asked for details?

Mr. Doyle: Let's take these one at a time, please.

Mr. Christin: You are quite right, counsel.

(Testimony of John M. Storkerson.)

Q. Did he tell you, in substance, that he had discussed with Hawkins certain policies that Montgomery Brothers were following on the Pacific Coast?

A. Did he discuss certain policies of Montgomery Brothers?

Q. Yes, with Hawkins, and reported that back to you?

A. I don't know what is meant by the question just generally "certain policies."

Q. Well, did he tell you that Hawkins had told him that he thought Montgomery Brothers could use better policies than they had been using in Los Angeles?

A. The essence of his reports was of that nature.

Q. And he told you he discussed that with Hawkins, did he, when he got back, I mean the Doctor did?

A. The Doctor did what, sir?

Q. Did the doctor tell you he had had this conversation about certain policies of Montgomery Brothers that were in effect that might be improved if Montgomery Brothers were out of [160] the picture? Did the doctor say that he discussed that with Hawkins?

A. I don't remember that specifically.

Q. Did he say that Fenwal would entertain a proposal from a new group to be formed of Montgomery employees after the termination; that that had been discussed with Hawkins?

A. He mentioned that it had been discussed; that

(Testimony of John M. Storkerson.)

something of that nature had been discussed with Hawkins.

Q. Tell us what you remember he said about the whole thing. You remember that, don't you?

A. I remember very little on that particular point. As I recall, I only saw Dr. Walter briefly when he came back.

Q. As General—pardon me.

A. As I recall, he mentioned the fact, I believe, Mr. Hawkins mentioned to him that the Montgomery Brothers were working with their people on some new group within their company.

Q. You remember that now?

A. I beg your pardon?

Q. You remember that?

A. I remember something of that kind.

Q. Did he say that he had told Hawkins that he, Dr. Walter, thought the only way to handle it was to have a factory representative in Los Angeles and not an employee? A. I don't remember.

Q. As General Manager, of Fenwal Company at that time, having [161] learned that much of the conversation, weren't you interested in getting from Dr. Walter the whole picture on the Pacific Coast where so much business was emanating from?

A. At that particular time I was principally interested in production problems and engineering problems, sir.

Q. When, so far as you know, was it determined by Fenwal to write the letter of December 29 terminating that contract? When was that?

(Testimony of John M. Storkerson.)

A. As near as I can recall, it was some time in early December.

Q. Well, how early? Have you got any date on it?

A. I know there was a running discussion on the matter; there had been for a long time.

Q. I beg your pardon?

A. I know there was a running discussion on the matter.

Q. Well, before the letter of December 21st, which was delivered on the 29th of December—I mean the 31st of December to Montgomery Brothers by mail, had you in any way told Montgomery Brothers that you anticipated the termination of that contract before you wrote that letter?

A. Had I told Montgomery Brothers?

Q. You, as General Manager.

A. That we were going to terminate that contract?

Q. Yes, sir.

A. Prior to the time we sent the letter?

Q. Yes. [162] A. No, sir.

Q. So far as you know, had any other executive authorized to utter that information told Montgomery Brothers? A. No, sir.

Mr. Christin: Do you want to take a recess?

(Recess.)

Q. (By Mr. Christin): After Dr. Walter returned from the West Coast to Ashland do you re-

(Testimony of John M. Storkerson.)

call Mr. Ray Montgomery coming to Ashland in October, 1948? A. I do.

Q. You do. Did you have conversations with him at that time and place? A. I did.

Q. And who was present at those conversations?

A. Mr. Ray Montgomery and myself.

Q. Just you two, as far as you know?

A. As I recall.

Q. Did you on that occasion in substance tell him that Dr. Walter had had these conversations with his employee or his Los Angeles Manager in Los Angeles in the month of September?

A. I did not.

Q. You at that time knew—I mean, when you saw Ray Montgomery there in October you knew that Dr. Walter had had conferences with Mr. Hawkins, their General Manager in Los Angeles, in September? [163]

A. Possibly so, but I had no direct conversations with Mr. Montgomery insofar as matters requested by Mr. Montgomery of Mr. Robinson; all I did was to sit and take notes.

Q. Was Mr. Robinson in any conference with you and Mr. Ray Montgomery in any time in October, the three of you?

A. As I recall, Mr. Montgomery got in touch with Mr. Robinson and told him he wanted to see him. Mr. Robinson advised Mr. Montgomery that he was going away on vacation, and Mr. Montgomery came anyway. And therefore I took the notes of what he was going to ask.

(Testimony of John M. Storkerson.)

Q. Do you know whether Mr. Ray Montgomery saw Dr. Walter on the October visit?

A. I wouldn't know, sir.

Q. Would you tell me what was said by you and Ray Montgomery in any of those conferences or conversations in October in Ashland, in October, 1948? What is the best of your recollection?

A. I don't recall that very much was said. As I recall, he came in in a hurry with a number of detailed commercial items, on which I took notes for Mr. Robinson.

Q. In the month of December, 1948, did you know what articles were being handled by Mr. Hawkins as the Los Angeles Manager for Montgomery Brothers other than Fenwal products?

A. Other than Fenwal?

Q. Yes. [164] A. No, sir.

Q. Did you know at that time that Montgomery Brothers were handling other lines than Fenwal?

A. Yes, I did.

Q. What lines were those?

A. The Krumlox(?) Line.

Q. Is that a Wiegand product?

A. Wiegand product.

Q. Did you know of any other products they were handling?

A. Yes, I heard of a number of them; I don't recall the names of the various companies.

Q. Did you know that Mr. Hawkins, as Manager of the Los Angeles office, was handling all of the lines of Montgomery Brothers, including Fenwal?

(Testimony of John M. Storkerson.)

A. I didn't know that Mr. Hawkins was Manager of the office. I do know, though, that when various members of our company came back, it was one of our complaints that not enough time was being spent on our own products in Los Angeles.

Q. Even though the sales had jumped up to \$266,000——

A. That is correct.

Q. That wasn't satisfactory?

A. It isn't a question of the sales being satisfactory; it is a question of the amount of effort being put in on our behalf.

Q. Did you ever write any letters to Montgomery Brothers calling their attention that they were delinquent in any respect [165] in their representation of your company on the Pacific Coast?

A. I received a number of reports from our own people as to discussions——

Q. I didn't ask you that; I asked you, did you communicate with them in any way or ways in writing that their representation of your company on the Pacific Coast was unsatisfactory?

A. You mean my company?

Q. You. A. I personally, no.

Q. Did you know that Montgomery Brothers have an office in Portland, Oregon?

A. Yes, I do.

Q. Do you know that Montgomery Brothers have an office in Seattle? A. Yes, sir.

Q. And did you know who handled the Fenwal Line for Montgomery Brothers in Seattle?

(Testimony of John M. Storkerson.)

A. I understood that Mr. Reed had given a very small portion of his time to Fenwal.

Q. I didn't ask you that. I asked you did you know who handled the line with the Boeing Air people in Seattle from Fenwal for Montgomery?

A. I understood it was Mr. Reed, sir.

Q. Did you know Mr. Reed?

A. I had met Mr. Reed. [166]

Q. When did you meet Mr. Reed for the first time? A. At the sales conference.

Q. And did you meet Mr. Reed in Seattle on or about the 20th or 21st day of January, 1948?

Mr. Doyle: '48?

Mr. Christin: I beg your pardon; '49. Thank you.

The Witness: On or about what date? What date in January?

Mr. Christin: Well, you name the date on this trip West when you landed here on the 24th.

A. Yes.

Q. You stopped off at Seattle, did you?

A. Yes, I did.

Q. And how near to the 24th?

A. It was the Monday before—it was Friday, as I recall, before the Monday I was in San Francisco. I believe that makes it the 22nd, or something like that.

Q. What was the purpose of your seeing Mr. Reed in Seattle?

A. The purpose of my seeing Mr. Reed, I merely called him because I was going through town.

(Testimony of John M. Storkerson.)

Q. Is that all?

A. I had other business in town.

Q. Didn't you go with him to the airplane companies?

A. I did. I was invited to go out with him to the Boeing Aircraft Company.

Q. What did you do out there? [167]

A. We went through the shop and talked to several of the engineers.

Q. Did you meet the Production Engineer?

A. We met the Production Engineer, yes.

Q. Was anything said by you to them of a contemplated change in the Pacific Coast representation?

A. No, I had talked with the purchasing people the day before.

Q. You had gone to see the airplane people the day before you saw Reed, is that right?

A. Yes, sir.

Q. By that you mean Boeing? A. Yes.

Q. Whom did you see there the day before you went out with Mr. Reed?

A. Mr. N. W. Gregg.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Did you tell him that you were going to make a change on the Pacific Coast?

A. I told him we were contemplating making a change.

Q. Did you tell him who was going to be in charge? A. I did not.

(Testimony of John M. Storkerson.)

Q. Did you have a conversation with Mr. Reed which in substance was as follows: that you asked Mr. Reed to leave [168] Montgomery Brothers in that area and take over the representation of Fenwal in Seattle with Boeing? A. I did not, sir.

Q. Nothing of that kind at all?

A. No, sir.

Q. Who was going to handle the Seattle business if you did terminate with Montgomery?

A. We had—that was one of the reasons I went to Boeing to discuss it with them, because we had a number of plans.

Q. Plans? A. Yes, sir.

Q. And during your association with Fenwal did Fenwal ever directly on the Pacific Coast sell to the manufacturers, or was it always done through a representative?

A. I believe in the early days of the business we sold direct. And if you mean by “sold” selling effort, we have not done so since Montgomery Brothers—

Q. I am not talking about selling efforts; I am asking you, since you were there in 1945—I believe that is when you became associated with Fenwal—is that '45? A. Yes.

Q. Was any direct sale made by Fenwal to manufacturers on the Pacific Coast?

A. Was any sale a result of our effort on the West Coast?

Q. No, I didn't say that. Did you sell directly, or always [169] through this method of Mont-

(Testimony of John M. Storkerson.)

gomery buying from you and you making delivery to the manufacturer?

A. Selling is the product of effort getting the purchase order, we had people out here helping Montgomery Brothers sell on many occasions.

Q. Who came?

A. W. J. Turrene, E. J. Poitras—W. J. Turrene, C. J. Robinson, and others.

Q. Do you of your own knowledge—by “own knowledge” I mean being present on the Coast with any of these gentlemen—know what they personally did on the Coast, by being with them here, of your own knowledge? A. No, sir.

Q. This article that you manufacture, I understand it is of two kinds; one is the fire control thermostat to be used on airplanes and the other one is the ordinary switch manufactured by you, is that correct?

A. No, sir, Mr. Christin, we make many, many kinds of thermostats.

Q. With particular reference to the one used in the aviation industry, you have a patent on that article? A. We do. Which one did you say?

Q. The one that is sold to the aviation industry.

A. That is plural, the different switches that—

Q. Put it this way: All switches manufactured by you and used [170] in the airplane industry are patented? A. Correct.

Q. So they cannot be bought or similar articles cannot be bought from any other manufacturer than you? A. The same article, right.

(Testimony of John M. Storkerson.)

Q. You did tell the Court, I think in response to His Honor Judge McColloch's question, that you had competition?

A. We do have competition.

Q. What is that competition?

A. Our competition comes from companies who approach these various problems from a different principle. I believe I can point out to you, as for example, fire detection, we make a unit, fire detector of our own special design. In competition with us there have been a number of other types such as the Willcolator (?) switch, which has been used on the West Coast. Also there is another approach on the Wright (?) type, and there have been others from time to time.

Q. Is it a fact that your fire control switch is the one that is used on all standard airplanes, by that I mean Lockheed, Douglas, Northrup?

A. It is used by a substantial number.

Q. And you knew when you terminated at Montgomery that they could not or would have great difficulty in finding any competing article to supplant yours for the carrying on of that [171] business?

A. I beg your pardon?

Q. You knew when you terminated Montgomery that there was no other product available to them as good or could compete successfully with the fire control switch that you were then selling to them and selling to the airplane manufacturers?

A. If you are speaking of the quality of our merchandise, I would agree; but there are certainly

(Testimony of John M. Storkerson.)

other items on the market which they could secure which are in competition.

Q. None of these other articles were being used by the Pacific Coast airplane manufacturers during the years '48 and '47?

A. I believe so.

Q. Which companies used that competing article?

A. You mean the manufacturer, aircraft manufacturer? Oh, I believe Douglas, for example, has somebody's fire detection system used as part of their aircraft. I am not sure about that.

Q. These orders that were lodged with you in January and February, some were accepted and some weren't?

A. Correct.

Q. What method did you use to determine which were accepted and which were not?

A. We did not feel called upon to accept any order that we did not agree that all of the conditions of that order were satisfactory to us; and the ones that were for immediate shipment we didn't question; therefore we accepted them. [172]

Q. But prior to the months of January and February, 1949, you had accepted all orders?

A. We had accepted them after the usual checking, if they were straightened out to our satisfaction.

Q. But you refused to accept some of the January and February orders even though you made the usual check?

(Testimony of John M. Storkerson.)

A. We refused some of the January and February orders.

Q. Now, the sales to Montgomery Brothers for the months of January and February, as I understand it——

A. Mr. Christin, may I correct my last statement slightly. I said we refused. We did not refuse; we just didn't accept.

Mr. Christin: I beg your pardon?

(The Reporter read the answer.)

Q. In the past you had by some affirmative act accepted the order and not just done nothing about it; is that right? A. I couldn't hear you.

Q. I mean in the prior months before January and February you would do some affirmative act to accept, such as processing the order; there would be some affirmative act?

A. I'm sorry; I can't understand.

Q. Prior to January and February, 1949, any orders that were lodged you would process the order and thereby accept it, is that correct?

A. Yes, sir.

Q. But some of the orders in January and February, 1949, you [173] didn't?

A. That's right.

Q. Now, how did you determine which to process and which not to process, or, in other words, which to accept or not accept?

A. We accepted the ones that we would give de-

(Testimony of John M. Storkerson.)

livery on before—prior to the termination date with Montgomery Brothers, roughly.

Q. Those orders in those two months amounted to approximately \$166,000, didn't they?

A. Excuse me.

Q. The orders which had been lodged with you amounted to \$166,192 for those two months, is that correct?

A. I wouldn't know.

Q. If those figures are correct, that would be the amount? We will prove those later.

A. Correct.

Q. And the selling price of those articles by Montgomery Brothers to their trade was \$202,548? If that figure is correct, that will be your answer, is that right?

A. Yes.

Q. Now, what had you done so far as Fenwal is concerned to obtain those orders which were lodged with you in January and February, 1949?

A. Insofar as obtaining this first section, we had provided our usual services to Montgomery Brothers. That was our contribution.

Q. What services were those? [174]

A. Technical services; providing all the information they need to sell particular applications. Any—we sent many, many letters out there on the particular applications regarding technical application problems and so forth.

Q. But had you done anything different about obtaining the orders in January and February, 1949, than you had done to obtain orders in any month in 1948?

A. No, sir.

(Testimony of John M. Storkerson.)

Q. So, then, as of that time when those orders were lodged with you in January and February, when they were filed, except for cancellations Montgomery would have had a profit of \$36,355? If that is the correct amount you would answer yes, would you? A. Yes.

Q. You knew Montgomery Brothers were claiming that entire amount of profit, is that right?

A. That's right.

Q. And you did continue to fill some of the orders in January and February? A. Yes.

Q. And you took an assignment of all the other orders in March, 1949, is that right?

A. In effect, yes.

Q. And you have filled those orders of March, 1949, up to the present time? [175]

A. Yes.

Q. And it is your contention that you should keep all of the profit yourself, to wit: the difference between——

Mr. Doyle: The pleadings in this case speak for themselves. I think you can get from the pleadings what the position of the parties is.

The Court: This isn't pleading; this is evidence. I know what your positions will be in that regard, but I want Mr. Christin to get all the facts about this particular matter.

Mr. Christin: As a matter of fact—I was interrupted there by counsel.

Mr. Doyle: I beg your pardon, Mr. Christin. Perhaps the Reporter can read your statement.

(Testimony of John M. Storkerson.)

Mr. Christin: Your Honor, I never had the pleasure of practicing before Your Honor, although I always use your decisions in OPA matters. But you told us when you opened up you were disposed to hear all the facts, so I want to try to get them all at one time.

Q. Put it this way: You know that the amount I told you, \$36,355, is the difference between what Montgomery Brothers bought those articles from you for and what they resold them to their customers for? A. That is my understanding.

Q. And it is your contention you want to keep all of that? A. I don't think—— [176]

Q. Is that the nature of your contention?

Mr. Doyle: Let him answer the question. You asked it, let him answer it.

A. I don't think that that question has anything to do with it, because, in the first place, when our payments were refused our company we certainly couldn't be expected to go on and ship continuously fifty or a hundred thousand dollars a month when we have a limited working capital and keep on shipping and shipping with absolutely no hope of income of money on which to do business. We would have been ruined in a short time.

Q. (By Mr. Christin): You had asked Montgomery Brothers before for an assignment, hadn't you, of these contracts? A. I had.

Q. When did you ask for the assignment of these contracts? A. In January.

Q. Did they refuse it?

(Testimony of John M. Storkerson.)

A. No; the substance of that conversation, as I recall it, was—in the first place, when I came to San Francisco, we tried to—I was there for the purpose of dissolving the association between them and ourselves, and how much profit they should retain——

Q. Answer the question: Did they refuse or not refuse the assignments when you asked them?

A. When I first asked them?

Q. Yes. [177]

A. I don't think they were asked for it at first.

Q. I thought you said the other day you discussed it on the January conference?

A. We did discuss it.

Q. When you asked for it in March in Los Angeles you got it right away, didn't you?

Mr. Doyle: His testimony was not that he asked for——

Q. (By Mr. Christin): You asked for it in March, didn't you? You went out to the airplane companies and arranged for an assignment in March?

A. I suggested it to Mr. Montgomery, that the only way the argument could be settled in a manner which would take care of the question of profits and the airplane companies, would be on the basis of an assignment, or some such method.

Q. He acquiesced right away, didn't he?

A. He acquiesced, yes, with certain provisos.

Mr. Christin: That is all.

(Testimony of John M. Storkerson.)

Redirect Examination

By Mr. Doyle:

Q. Mr. Storkerson, Mr. Christin asked you about your trip to Seattle on January 21, 1949, and you stated that you saw a Mr. Gregg of Boeing Aircraft? A. I did, sir.

Q. You told Mr. Christin what you said to Mr. Gregg: That you were contemplating a change from Montgomery Brothers. What did Mr. Gregg say to you?

A. Mr. Gregg said to me that, in connection with our consideration [178] of whether we should set up a factory representative as we had had in their territory, that it was the policy of their company that they preferred to deal directly with the principal and he would appreciate it if we would deal directly from our factory to their factory so that they could be dealing with the people who built and were responsible for the switches.

Q. That they preferred that to a manufacturer's representative arrangement?

A. Yes, they did.

Q. Mr. Christin asked you, and I believe you replied, that you didn't seek to employ Mr. Reed of the Montgomery organization at that time or at all; is that correct? A. That is correct.

Q. Did Mr. Reed then seek employment from you?

A. He sought employment from me on the second visit to Seattle.

(Testimony of John M. Storkerson.)

Q. Was that the January visit or a later visit?

A. That was the visit in March.

Q. Did you accept or reject his proposal?

A. I rejected his proposal.

Q. Did you ever offer him employment?

A. I have never offered him employment.

Q. When was it determined to terminate Montgomery Brothers representation of the Fenwal line?

A. The exact date of determination probably—we had discussed [179] it for a long, long time, for years, practically every time somebody would come back from the West Coast the matter was discussed because of their displeasure with the situation. As near as I can remember there was a week or ten days before our last directors' meeting there were discussions in our plant between the directors at which the decision was in effect made.

Q. What do you mean the last directors' meeting?

A. The directors' meeting of December prior to the termination. So it would be some time around mid-December that the decision was finally made, although I knew it was in the making for a long time.

Q. Did you consult your Boston counsel about it before you wrote them the letter of December 29, 1948?

A. We did.

Q. Some time before the letter went out?

A. Some time before the letter went out.

Q. And the phrasing of that letter was partly his; is that correct?

(Testimony of John M. Storkerson.)

A. He assisted us with it.

Q. He assisted you in the preparation?

A. Correct.

Q. Mr. Christin asked you about your plans for handling the California business of Fenwal in the event of a termination of Montgomery Brothers, and you stated in reply, I believe, that you thought you would be able to get Mr. Hawkins. Had you [180] any other plans?

A. We certainly did. Mr. Hawkins was only a possibility; one of several. I had discussions of it with Mr. Robinson at our plant, as I recall, and we had talked about this possibility of a man up in the North who was fully capable in the event Hawkins were not selected or did not care to come with us.

Q. Except for his telephone call to you on or about the 31st of December, 1948, to which you had testified, the only time you ever discussed employment with Mr. Hawkins was the night of January 26th at Los Angeles; is that correct?

A. Yes, sir.

Q. Now, with respect to these orders which had been received from Montgomery Brothers prior to the end of the year 1948, were all of the orders that came in up to the end of the year and up through the notice of termination accepted? A. Yes.

Q. And is it also true that all of the orders received during the months of January and February of 1949, that is, during this 60-day termination period, which were for delivery within that 60-day period were accepted? A. Yes.

(Testimony of John M. Storkerson.)

Q. So that the only orders not accepted during that period were those for delivery after the end of the 60-day period? A. Yes, sir.

Q. Then was it those orders which were the subject of discussion [181] between you and the Montgomery Brothers in San Francisco at the end of January, 1949? A. Yes, it was.

Q. Was it the amount of profit which they were to receive upon those orders that you were discussing?

A. That was the profit we were discussing.

Q. As I understand Mr. Christin's interrogation of you on that subject, their claim to profit on those orders was something in the neighborhood of \$36,000 or \$37,000? A. Yes.

Q. Roughly. Now, at the end of that discussion with them in San Francisco what determination had you reached, or did you believe you had reached, with them respecting the allowance of that profit?

A. I believed that I had arrived at an agreement with them under which—on that particular profit, as a matter of fact, there was only a spread of some three or four thousand dollars. The actual arrangement was under the terms of Dr. Walter's letter which came through later, on the basis of—

Q. Wait a minute. What do you mean "There was only a spread of three or four thousand dollars?"

A. We had given them everything, everything that they claimed, except a matter of something like \$4,000.

(Testimony of John M. Storkerson.)

Q. You mean of the thirty-six or thirty-seven thousand dollars they were claiming—— [182]

Mr. Christin: If your Honor please, this is leading. I think the witness understands the question, and he has answered it "There was only a spread of \$3,000."

Q. (By Mr. Doyle): Of the thirty-six or thirty-seven thousand dollars which they were claiming, you thought you had made the arrangement whereby all but three or four thousand dollars of that would be allowed, is that correct? A. Yes, sir.

Q. And that was the arrangement that you speak of referred to in the letter of February 4th from Dr. Walter to Montgomery? A. That is right.

Q. The other question under consideration was the question of their representation under a new contract for the territory north of Los Angeles; is that it? A. Right.

Q. I believe your testimony was that you separated those two things? A. I did, sir.

Q. But that at the Los Angeles meeting with Ray Montgomery he sought to put them together?

A. Yes, sir.

Q. Then your letter of February 9th enclosing a contract was pursuant to the second part of the negotiation, namely the contract for representation in the northern territory?

A. That is right, Mr. Doyle. [183]

Q. Did either of the Montgomery Brothers at any of these meetings you held with them indicate to you in any way whatsoever that they were aware

(Testimony of John M. Storkerson.)

of Fenwal's financial situation? A. They did.

Q. What did they say?

A. One recollection of it was—I mean my recollection of one instance was when Mr. Fred Montgomery, while he visited here in San Francisco in March, talked at great length about the weakness and the very poor financial situation of our company, and at the same time discussing the strength of his own company.

And I also remember something said in regard to—I mean I remember that something was said at the first conference with reference to the same subject, but I couldn't tell you exactly what it was, of the same nature.

Q. With regard to that proposed new contract for the northern territory, did I understand that Montgomery Brothers were insisting that under it they should have the right to buy and to resell as they had had under the old contract?

A. You mean, Mr. Doyle, at the time that I received the letter from them? They were insisting all the time, that they wanted to do that, but I had told them that we absolutely wouldn't consider it.

Q. Your statement was, as I recall it, that it would have to be your usual manufacturers representative arrangement?

A. Exactly the same kind of contract that we had with other representatives [184] throughout the country.

Q. And the old Montgomery contract which had

(Testimony of John M. Storkerson.)

been terminated by the 60-day notice was a unique contract in that respect? A. It was.

Q. Did Dr. Walter's letter of February 4, 1949, in evidence here as Plaintiff's Exhibit 9, express your understanding of the arrangement reached at the first San Francisco meeting with Fred and Ray Montgomery? A. It does.

Q. And is it in accordance with the report you made to him by telephone the evening of that meeting? A. It is in accordance with it.

Q. At your meeting with the Montgomery Brothers at the end of January, I believe you said it was the 26th, do I understand that you told them you were going to see Mr. Hawkins when you got to Los Angeles and make him a proposal? A. I did.

Q. Orally or in writing? A. Orally.

Q. Did he accept it? A. He accepted.

Q. What was the arrangement about when he would go to work for Fenwal?

A. After—he was to go to work for us after his employment date was completed with Montgomery Brothers. He was already on [185] notice.

Q. You mean he had already given notice to Montgomery Brothers?

A. He had given notice about the 15th of the month.

Q. When did he go on the Fenwal payroll?

Mr. Christin: What month, please? The 15th of what month?

A. I think he went on our payroll approximately

(Testimony of John M. Storkerson.)

March 1st, but I'm not sure; I would have to check the records.

Q. (By Mr. Doyle): He went on the Fenwal payroll on March 1, 1949?

A. As I recall; I would have to check.

Q. And your meeting with him at which you reached an understanding in that respect was January 26th? A. Correct.

Q. Then the next morning when you say Ray Montgomery and you went to visit the aircraft companies, you say you told Montgomery that you had hired Hawkins?

A. I either told him or gave him reason to know, because I already told him I was going there for that purpose.

Q. I show you, Mr. Storkerson, a purchase order on Montgomery Brothers purchase order form and direct your attention to the fact that this particular order bears No. 15571 and is addressed to Fenwal, Inc. January 26, 1949, with directions to ship to Boeing Aircraft Company, Seattle, Washington, and ask you whether or not that is the usual purchase order form received in the ordinary course of business by Fenwal from Montgomery Brothers? [186] A. It is. .

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit No. 31.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 31 in evidence.

(The Purchase Order Form referred to was marked Plaintiff's Exhibit 31 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 31

This number must appear on
B/L., shipments and invoices
No. 15571

Purchase Order
Montgomery Brothers
Engineers—Manufacturers—Chemists
1122 Howard Street
San Francisco 3, U. S. A.

Airmail

To: Fenwal Inc.

Date: Jan. 26, 1949

Requisition No.: 9674

Ship To: Boeing Airplane Company
Seattle, Washington

When: At Once—By February 1, 1949

Route: Parcel Post

Number and Mark All Packages.

Mark: #228066-07

Please Enter Our Order for the Following Material. Ship as Directed, Noting Carefully All Instructions and Conditions Given.

This order is placed with the distinct understanding that in the event of prices declining before the time of Shipment, we are to be given the benefit of such lower prices or discount.

We assume price quoted below correct unless notified before shipment.

Goods subject to our inspection, notwithstanding prior payment to obtain cash discount.

(Testimony of John M. Storkerson.)

Goods rejected on account of inferior quality or workmanship will be returned to you with charge for transportation both ways, plus labor, reloading, trucking, etc., and are not to be replaced except upon receipt of written instruction from us.

It is understood that in accepting this order you hereby covenant and agree to defend and save harmless Montgomery Brothers against any and all claims which may be made under the Patent Laws of the United States on account of the manufacture, sale or use of the articles within named and likewise of any other article furnished pursuant thereto.

Quantity

Articles

3

#17401 Fenwal Thermoswitches.

Master

cc. Seattle

Acknowledge and Advise Definite Shipping Date

Terms: Unless you indicate to the contrary on your invoice, we shall discount your bills on the tenth of each month.

No allowance for Boxing or Cartage.

All invoices to be submitted in duplicate direct to San Francisco, together with all shipping papers on day shipment is made.

MONTGOMERY BROTHERS,

Per /s/ T. M. HART.

[Endorsed]: Filed July 12, 1950.

(Testimony of John M. Storkerson.)

Q (By Mr. Doyle): With respect to the question of the non-payment of shipments made during January, when was the fact of non-payment first brought to your attention?

A. About the same time as the arrival of Mr. Montgomery's letter to me.

Q. You mean the letter of February 14th?

A. Right, in which he took exception to the contract arrangement, I had offered him.

Q. In advance of your telegram of February 21st inquiring about the payment?

A. It was a very short time.

Q. That day or the previous day?

A. Yes, that is right.

Mr. Doyle: That is all.

Recross-Examination

By Mr. Christin:

Q. You said that the letter of Dr. Walter of February 4th was in keeping with your conversation with Dr. Walter on the phone. When did you have that conversation with [187] Dr. Walter on the phone?

A. I called Dr. Walter on the phone on the evening of the first night that I was here with regard to the advance in our discussions to that date, and on the evening of the second night that I was there—on the evening of the first night that I was here in San Francisco we had outlined the whole arrangement so that I was prepared on the following date to tell Montgomery Brothers, as I recall, I was able

(Testimony of John M. Storkerson.)

to tell them that the terms looked—that they had offered looked satisfactory to us and were acceptable to me. As I recall, I was told to tell it to them. I told them I was going to phone it directly and entirely in accordance with the information they had given me, and it should be identical with the discussion of that day in Mr. Montgomery's office—should be identical with what exactly is expressed in Dr. Walter's letter.

Q. In that conversation with Dr. Walter did you tell him that Montgomery Brothers were to settle the profit question and also at the same time determine what their rates were to be under the new contract? Did you report to Dr. Walter there were two things under consideration? The settlement of the profit and also the settlement of the new territory. Did you tell that to Dr. Walter on that phone conversation?

A. No, sir, because it wasn't taken up; as a matter of fact, I was going to settle the matter of profits with Montgomery Brothers there and I told them I would write to our office [188] and have Dr. Walter write a letter for their acceptance. As I left San Francisco I told them I would negotiate a contract with them—I would consider the negotiation of a contract with them when I was in Los Angeles. As I recall, I told Mr. Ray Montgomery I was going to submit a contract to them.

Q. Before you left San Francisco didn't they tell you that they wouldn't settle the matter of profit

(Testimony of John M. Storkerson.)

unless they determined in the same transaction on the terms of the new contract?

A. No, sir, because at the time I met Mr. Ray Montgomery at his hotel, I believe the Savoy, in Los Angeles, some weeks later, we had a considerable argument about the fact that he had at that time, as I understood it, departed from his original agreement that he would go along with us on the profits and keep the other separate.

Q. It is your testimony, then, in San Francisco nothing was said about a new contract; you confined your conversations entirely to the settlement of the matter of profits?

A. I didn't say that. We talked about the possibility of negotiating one.

Q. Very well. Did you tell that to Dr. Walter: that Montgomery Brothers were insisting on a new contract before they would settle the profit question? Did you tell that to Dr. Walter in either conversation with him in San Francisco?

A. I didn't.

Mr. Christin: That is all. [189]

The Witness: If I understood the question—I would like to have that again; I want to be sure I understand it.

Q. In that conversation with Dr. Walter before you went to Los Angeles, did you tell Dr. Walter in that conversation that Montgomery Brothers had been discussing with you the matter of the new contract and wouldn't consider a settlement of the profit question unless they had a new contract and the

(Testimony of John M. Storkerson.)

two things ought to be settled in one operation? Did you tell him that in substance?

A. I reported to Dr. Walter in substance that I had—that we had come to a reasonable agreement—we had come to an agreement on the profit question, and that I had told them I would consider the negotiation of a new contract.

Q. You did discuss that with Dr. Walter on the phone?

A. That I told them that I would consider a new contract.

Q. When Dr. Walter sent out the letter of February 4th it only referred to the matter of the settlement of profit and was silent as to the new contract; is that correct?

A. That was my agreement with Montgomery Brothers.

Q. Then in the letter of the 9th he did send a new contract which provided for a new contract so far as territory was concerned?

A. The contract that was submitted on the 9th I submitted as part of the promises when I returned.

Mr. Christin: That is all. [190]

Mr. Doyle: That is all.

The Court: That is all. Get down from there while you can. They are through with you.

The Witness: I'm sorry. Thank you, your Honor.

Mr. Doyle: The Plaintiff rests.

Mr. Christin: Mr. Raymond Montgomery.

W. RAY MONTGOMERY

called for defendant, sworn.

The Clerk: State your name to the Court, please.

A. W. Ray Montgomery.

Direct Examination

By Mr. Christin:

Q. Where do you reside, Mr. Montgomery?

A. 2110 Jackson Street, San Francisco.

Q. Are you in business in San Francisco?

A. I am.

Q. What business are you engaged in?

A. My brother and I are the sole owners of Montgomery Brothers.

Q. How long has that business been in existence?

A. Since about 1920.

Q. And you are the two partners in that business, is that correct?

A. Yes, sir.

Q. What is the nature of that business? What do you do?

A. We are sales representatives for eastern manufacturers, and we manufacture some products ourselves and sell them in the territory which we designate as the territory west of the Rocky [191] mountains, including Alaska and the Orient.

Q. And what articles were you handling as sales representatives in the year 1948?

A. We handled the Edwin L. Wiegand line of electric heating elements.

(Testimony of W. Ray Montgomery.)

Q. What are they?

A. They consisted of a complete line of all kinds of electric heating elements.

Q. Used for what?

A. Used in different appliances, such as service burners for electric ranges, immersion heaters for electric hot water heaters, cartridge units and all different types of electric elements.

Q. What other articles were you handling?

A. We were handling Peerless Electric Account from Warren, Ohio.

Q. Any thermostats?

A. We were handling some thermostats in conjunction with the Edwin L. Wiegand line and a water heater tank thermostat manufactured by the Iron Fireman people of Portland, Oregon.

Q. And at the same time in 1948 you were also handling Fenwal products?

A. Fenwal line, yes, sir.

Q. And these various representations you have referred to, did you handle them on a basis that you would buy at a price from the [192] manufacturer and you would sell to your customers at an increased price?

A. It has always been——

Q. Did you so do? A. We did, yes, sir.

Q. Did you have any of those lines on a commission basis?

A. No, sir.

Q. Where was your business conducted in the year 1948?

A. Our home office is in San Francisco. We have branch offices in Los Angeles, in Portland, Oregon, and in Seattle, Washington.

(Testimony of W. Ray Montgomery.)

Q. And what territory did your business serve?

A. It served all of the territory west of the Rocky Mountains.

Q. What title do you give to the men who are in charge of any local area? What are they?

A. We generally have a local manager, and under these local managers we have sales engineers and also clerical workers, such as girls in the office.

Q. Who was the Sales Manager, Office Manager, in Seattle?

A. In Seattle, Mr. Floyd Doldwin, and in Portland, Mr. Robert M. Harmon.

Q. Where was your office in Seattle?

A. 911 Western Avenue.

Q. In Portland?

A. On Marshall and 15th Street.

Q. And who was the Office Manager in Los Angeles? [193]

A. Mr. Ed Hawkins, in 1948.

Q. Where was the office there?

A. 941 E. 8th Street.

Q. How long had Mr. Hawkins been in your employ?

A. He came with us in the early part of 1935, to the best of my recollection.

Q. And when he came to you what was his position?

A. He was an apprentice in our shop in San Francisco.

Q. Where did he work?

(Testimony of W. Ray Montgomery.)

A. He worked at 61 Fremont Street, which at that time housed our shop.

Q. And what were his duties?

A. His duties were to work in the shop, to do any and all things, to learn as much as he could about the trade that—the business that we were engaged in.

Q. Then did you have him under your personal supervision after he left the shop and engaged in sales?

A. He was under my supervision—personal supervision.

Q. Do you have an engineer in the shop in San Francisco? A. We do.

Q. Who is he? A. Mr. A. D. Conant.

Q. Did you ever train Mr. Hawkins in engineering so far as your engineering problems were concerned before Mr. Hawkins left San Francisco?

A. He worked out of San Francisco first in sales.

Q. Then did he go to Los Angeles?

A. Yes, sir.

Q. In what year?

A. I should say in 1939 or '40; I'm not sure of that particular point.

Q. In what capacity?

A. He came down there as an office clerk.

Q. What were his duties as office clerk?

A. He was handling all the clerical work in the office and assisting in counter sales from the office.

Q. What year did he go down there?

A. I think it was in 1939 or 1940.

(Testimony of W. Ray Montgomery.)

Q. Did you at that time have the Fenwal line?

A. No, sir.

Q. Did he acquaint himself with the selling of your other lines at that time? A. He did.

Q. And did he do a satisfactory job?

A. Yes, sir.

Q. When you took on the Fenwal line in Los Angeles who handled that line?

A. At the time that we took on the Fenwal line Mr. Hawkins handled the line at that time along with other things that we had to sell. [195]

Q. What was the article that was then being purchased by you from Fenwal when you first took it over in 1942?

A. Commercial switches mostly; that is, not aircraft, but commercial switches.

Q. Then when did the aircraft switches come into the picture?

A. The middle, or about the middle of 1942.

Q. Do you know how that was developed?

A. Yes, sir.

Q. Did Mr. Hawkins have anything to do with the development of that switch?

A. Not at the very beginning, but he did after 1942.

Q. In the beginning who first created or caused the work on the airplane switch?

A. I did myself.

Q. Where?

A. The first order I secured was from Boeing Aircraft Company in Seattle, Washington.

(Testimony of W. Ray Montgomery.)

Q. Had they been used on airplanes prior to that time to your knowledge?

A. Not to my knowledge.

Q. Was there a change in pattern or a change in the mechanical construction necessary to apply them to airplanes?

A. At first only modifications of the standard switches. After that it became a question of designing the switch to fit the job.

Q. Who would contact the engineers for Boeing in Seattle? [196]

A. Myself.

Q. Any man up there help you?

A. Mr. Doldwin.

Q. And in Los Angeles who would contact the airplane manufacturers?

A. Myself and Mr. Hawkins.

Q. Did he go with you to the companies?

A. He did.

Q. When you went out there he would go?

A. Yes, sir.

Q. What did he do, so far as you know, to collaborate with the engineers at the airplane companies to change this switch to make it adaptable to airplanes?

A. In the beginning of our handling the Fenwal Switch Mr. Hawkins and I went calling on all of the aircraft companies in Los Angeles. The Lockheed Company was the first company that became interested in using a switch as a unit fire detector.

Q. What do you mean by that?

A. A unit fire detector is a unit thermostat that

(Testimony of W. Ray Montgomery.)

is used in different parts of the airplane, especially in the engines themselves, to record and make contact upon a rise in temperature; the rise in temperature making the contact then lights a light, and the flight engineer is supposed to know then at that time that he has an undue heating problem at that source.

Q. What was done by you and Hawkins to develop that switch? [197]

A. At the beginning of our contacts all we had to sell was standard Fenwal switches, and they were not much interested in doing any special development work.

Q. Who is "they"?

A. Fenwal, in doing any special development work on aircraft switches, so that we applied from our standard switch the switch that seemed best for the application and then made standard modifications as shown in Fenwal's catalog, and——

Q. Were those switches as modified then purchased by the airplane companies?

A. They were purchased first by the Lockheed Company and used in great quantities on the first Constellations that were manufactured.

Q. Did Mr. Hawkins work with you on that problem in Los Angeles?

A. Mr. Hawkins worked not only with me, but in many instances by himself, with the Lockheed engineers.

Q. Do you know whether he took any special courses to familiarize himself with the problem?

(Testimony of W. Ray Montgomery.)

A. He worked very hard knowing that.

Q. As time marched on your business progressed for the selling of switches in Los Angeles?

A. It did, because we then started selling other aircraft manufacturers.

Q. Did anybody else in the Los Angeles area contact the airplane [198] trade than Mr. Hawkins and yourself?

A. We had other men in the office later, but in most instances, all of the contacts for the airplane companies on thermostats or Fenwal products that were to be used in the planes themselves, were handled by Mr. Hawkins. The other men made the contacts with the airplane companies for using standard switches for heat application in process work in the plant.

Q. In your duties with the Montgomery Brothers did you spend much time in Los Angeles?

A. I was forced to spend a great deal of time there.

Q. Did you go to the Northwest too?

A. Yes, sir.

Q. And make trips East during the year?

A. That is right.

Q. And while you were away who handled the Los Angeles Fenwal business?

A. Mr. Hawkins.

Q. Now, in the progress of your work with Fenwal did the business of purchases from Fenwal increase from 1942 to 1948?

A. Yes, sir.

Q. I show you a statement which I think you

(Testimony of W. Ray Montgomery.)

took from your books and ask you if that is the amount of purchases made by your company from Fenwal during the given years?

Mr. Doyle: You are not offering this as an exhibit?

Mr. Christin: No, as a memorandum. With this in hand to refresh [199] your memory, what were the annual purchases for those given years?

A. Shall I read from this?

Q. Yes, please.

A. In 1942 our purchases from the Fenwal Corporation was \$39,876.18. In 1943 our purchases were \$63,077.64. In 1944 our purchases were \$75,636.57. In 1945 our purchases were \$228,609.73. In 1946 our purchases were \$256,169.78. And our purchases in 1947 were \$229,895.00. And our purchases in 1948 were \$266,822.06.

Q. And in the same years what were your sales of articles which you had purchased from Fenwal?

A. Our sales—our billing to the customer in 1942 was \$47,712.91; in 1943, \$80,875.64; in 1944, \$83,950.07; in 1945, \$292,279.79; in 1946, \$347,603.72; in 1947, \$284,258.49; and in 1948 was \$356,920.44.

Q. During those years when the manager there you say was Mr. Hawkins, will you state to me the salaries that were paid Mr. Hawkins from '39 to '48, and bonuses?

A. Mr. Hawkins' salary and bonus in 1939 was \$1,370.39; in 1940 was \$1,660.00; in 1941 was \$2,300.00; in 1942 was \$2,900.00; in 1943 was \$2,900.00; in 1944 was \$2,900; in 1945 was \$6,574.36; in 1946

(Testimony of W. Ray Montgomery.)

was \$10,736.13; in 1947 was \$8,600.00; in 1948 was \$10,250.00, that is the combined salary and bonus.

Q. When was it customary to pay the [200] bonuses?

A. Ordinarily it was given as a Christmas present.

Q. About Christmas time?

A. About Christmas time.

Q. Or after the books were closed?

A. In the case of Mr. Hawkins, for two years it was after the books were closed. Prior to that time it was given as a bonus.

Q. Did you have occasion to go to the Fenwal Company in Ashland from time to time during these years?

A. I made approximately two trips a year, the Spring and the Fall.

Q. To Ashland, Massachusetts?

A. Yes, sir.

Q. Did Mr. Hawkins go on some of those trips?

A. Mr. Hawkins went to the factory, but not on the trips with me.

Q. Do you know how many times approximately he went during those years?

A. To the best of my recollection, once.

Q. Did he go to Kansas City?

A. Mr. Hawkins didn't; I did.

(Thereupon an adjournment was taken until Thursday, July 13, 1950, at 10:00 o'clock [201] a.m.)

Thursday, July 13, 1950, 10:00 o'Clock A.M.

The Clerk: Fenwal Incorporated versus Montgomery Brothers, on trial.

W. RAY MONTGOMERY

called for defendant, resumed the stand.

Direct Examination

(Continued)

By Mr. Christin:

Mr. Doyle, I went to the Clerk's Office this morning about the deposition of Mr. Hawkins. I find it has never been returned. Do you know anything about that?

Mr. Doyle: I know nothing at all about that, Mr. Christin.

Mr. Christin: It was taken and I thought it would be here signed and returned.

Mr. Doyle: It is your deposition; you took it; I don't recall anything having occurred after that time.

Mr. Christin: I think they wrote to you; he was still in your employ; he still is, I suppose, and I thought we would send it to you to have him sign it.

Mr. Doyle: We received no communication with reference to the deposition.

The Court: Where was it?

Mr. Doyle: In San Francisco. Mr. Christin took it at my office.

Mr. Christin: May we use a copy then?

Mr. Doyle: No, I think not; I would insist upon the original.

(Testimony of W. Ray Montgomery.)

Mr. Christin: Is there any way of having the man sent up here? [202]

Mr. Doyle: Well, I don't believe that Hawkins' deposition is admissible in this proceeding. If you wish to call Hawkins, that is your privilege; but the deposition certainly is not admissible in the absence of a showing.

Mr. Christin: The witness isn't here.

The Court: Where is he?

Mr. Christin: Los Angeles.

Mr. Doyle: Have you made any effort to subpoena him?

Mr. Christin: No, because I relied on the deposition.

Mr. Doyle: You can't introduce a deposition of a man whose absence is unexplained.

The Court: How far does the subpoena power extend in a civil case? I don't think it goes to Los Angeles.

Mr. Doyle: We will produce Mr. Hawkins if Mr. Christin wants to examine him.

Mr. Christin: That is almost unnecessary; I only have three or four questions.

The Court: Not giving too much time to this, I will just state the practice I am accustomed to. I think it is a hundred and some miles, if someone lives a hundred and some miles away from the place of holding court as stated in the Federal Rules of Civil Procedure, the deposition may be used——

Mr. Christin: Yes, sir.

The Court: At the choice of the party, even

(Testimony of W. Ray Montgomery.)

though he is within the reach of subpoena [203] power.

Mr. Christin: That is in there. He is more than four hundred miles away.

Mr. Doyle: Mr. Hawkins will be made available for Mr. Christin's use if he wants his testimony.

Mr. Christin: I would like it very much.

Mr. Doyle: If you want to have Mr. Hawkins here, you let me know and I will produce him.

The Court: That will be satisfactory.

Mr. Doyle: When will you want him?

Mr. Christin: I would like to have him this afternoon.

Mr. Doyle: Pardon me, your Honor; I will ask Mr. Storkerson if he can't get him present.

The Court: Lawyers fight more than businessmen.

The Witness: I hope not.

Mr. Christin: We get paid for it.

Q. Mr. Montgomery, you stated that you went East about two or three times a year?

A. Yes, sir.

Q. And you would go to the **Ashland factory?**

A. On all of my eastern trips I would call there.

Q. Were you there in the month of May, 1948?

A. No, sir.

Q. Were you there in the month of October, 1948?

A. In the latter part of September or the first of October, yes, sir. [204]

Q. Did you see Dr. Walter?

A. No, sir.

(Testimony of W. Ray Montgomery.)

Q. Did you see Mr. Storkerson?

A. Yes, sir.

Q. Did you see anybody else of the executives?
Mr. Robinson?

A. Mr. Turrene and at that time I passed the time of day with Mr. Finn.

Q. Who is Mr. Finn as you understand it?

A. He was also a member of the firm.

Q. At any of those conversations with those gentlemen did any of them express to you any dissatisfaction with the manner or way you were handling the representation of the Pacific Coast?

A. No, sir.

Q. Did any of those gentlemen at that time tell you of a conference that was had or a session that was had between Dr. Walter and Mr. Hawkins in Los Angeles in the month of September of that year?

A. No, sir.

Q. At any time while you were handling this account in a representative capacity, was any criticism made to you by any officer of the Fenwal Company criticising your method of representation?

A. No, sir.

Q. When you speak of an order, will you state what is done to [205] get the order?

A. As a specific answer to that question insofar as aircraft is concerned, we were in constant contact with the aircraft manufacturers and as a plane would be developed from the blueprint stage, we would be working with the Engineering Department to have our switches specified as a part of that

(Testimony of W. Ray Montgomery.)

plane. Then after the plane had passed the paper stage or the blueprint stage, if it was deemed advisable by the executives of the airplane company they would build a prototype plane. It was our position then to constantly attempt to see that our switches were approved on that plane, for once we were accepted and used in the specification of the plane, all orders for the plane from any source would then carry the switches that we had had specified. And that constituted the work that we would do prior to receiving an order for aircraft work. That went over a period or sometimes from eight to nine months, or even a year, before we actually got an order.

Q. Would the switch be changed in any form or manner to comply with some particular plane?

A. It could be modified and changed as the development work proceeded, and it was our position to work with the engineers to see if we could assist them in arriving at the proper switch for the proper application.

Q. Who would take care of that detail in that particular instance for your organization in Los Angeles? [206]

A. Mr. Hawkins followed most of it, and I followed it also.

Q. After the order was placed for that particular installation, what would be done by Montgomery Brothers?

A. After we received the order from the airplane company and secured the release shipping

(Testimony of W. Ray Montgomery.)

dates, we would forward our order to the Fenwal Company. Very often we would forward the order without the release dates if the airplane company couldn't give those dates at that time, but they would be sent just as quickly as we received them.

Q. After the order was placed, then I take it an acceptance would be received by you from Fenwal; is that correct? A. Yes, sir.

Q. Then what had to be done after that in order to close that transaction? What did Montgomery Brothers do?

A. There was a matter of servicing the account.

Q. What do you mean by that?

A. It was practically an office employee's job to handle the paper work. If for sake of argument, they would want to change the job around after they had given the release, usually they would send through a change order, either increasing or setting back the date of shipment, or increasing or decreasing the number of switches per shipment, and we would then, upon receipt of that change order, send the change order on our order blank or by way of a letter to the Fenwal factory.

Q. And after all that was done was payment received by you and [207] you made payment to Fenwal?

A. There could be another—if there were any rejections for any reason whatsoever, upon inspection by the airplane companies, we would then have to give them instructions as to what to do with those rejections. Most of the cases we merely had them

(Testimony of W. Ray Montgomery.)

send that to the factory, because in the majority of the cases the only changes that could be made in the switch would have to be made by the factory and not by the field representative.

Q. When were you first advised that this contract was terminated? On December 31st, was that it?

A. Yes, sir.

Q. Is that when you received the termination notice? A. Yes, sir.

Q. Upon receipt of that notice what, if anything, did you do?

A. On receipt of that notice we sent out a copy of the termination notice to our Seattle and Los Angeles offices.

Q. Prior to sending that out did you have any communications or conferences with Mr. Hawkins?

A. No, sir.

Q. When did you speak to Mr. Hawkins about this matter?

A. We received the cancellation notice on the last day of the year, the 31st day of December, 1948, and in 1949, on the first day of the year, that is, working day, which happened to be Monday, January 3rd, I had occasion to call our Los Angeles office, and during my call I asked if Mr. Hawkins was in, and I [208] spoke to him at that time.

Q. On the telephone? A. Yes, sir.

Q. What did he say and what did you say?

Mr. Doyle: Well, just a minute. If your Honor please, I do not see that a conversation between Mr. Montgomery and Mr. Hawkins in January of 1949,

(Testimony of W. Ray Montgomery.)

when Mr. Hawkins was Montgomery's employee——

The Court: Objection sustained.

Mr. Christin: May I be heard? There is testimony, I believe, to the effect that Mr. Storkerson said that—I am wrong on that.

Q. Did you receive a communication from Mr. Hawkins on January the 2nd (showing paper to witness)? A. Yes, sir.

Mr. Christin: I will offer this in evidence and ask that it be marked Defendant's next in order.

Mr. Doyle: Objected to, if your Honor please, to any communication between Mr. Hawkins and Mr. Montgomery and the Montgomery Brothers in January, 1949——

The Court: Of course, I realize the principle in this is the same as the oral discussion you just spoke about. I understand that. These people claim there has been some interference, piracy resorted to. I am disposed to let everything of a documentary nature that has been identified come in. [209]

Mr. Christin: May it be marked?

The Court: Subject to objection.

Mr. Doyle: Subject to objection as to competency, materiality and hearsay.

The Clerk: Defendant's B in evidence.

(The letter of January 2, 1949, Hawkins to Montgomery, was marked Defendant's Exhibit B in evidence.)

(Testimony of W. Ray Montgomery.)

DEFENDANT'S EXHIBIT B

Arcadia, California,
January 2, 1949.

Montgomery Brothers,
1122 Howard Street,
San Francisco 3, California.

Dear Fred and Ray:

This letter will constitute my notice of resignation, from your employ, effective thirty (30) days from this date.

I will leave the matter of the amount time I continue to work, up to the above-mentioned thirty (30) days at your discretion. There are certain introductions, in the territory, to be made—certain details to be wound up—and other matters which should be given as instruction to whoever replaces me. You are aware of this, and because of it I am, therefore, leaving the time limit up to yourselves.

I have not, and will not, announce the fact of my leaving to any customers of the firm until the end of an agreed notice.

Very truly yours,

/s/ EDGAR V. HAWKINS.

Edgar V. Hawkins,
301 San Luis Rey Road,
Arcadia, California.

cc L. A. files.

[Endorsed]: Filed July 13, 1950.

(Testimony of W. Ray Montgomery.)

Mr. Christin (Reading): January 2, 1949. Arcadia, California.

“Montgomery Brothers,
1122 Howard Street,
San Francisco 3, California.

“Dear Fred and Ray:

“This letter will constitute my notice of resignation, from your employ, effective, 30 days from this date.

“I will leave the matter of the amount time I continue to work up to the above-mentioned 30 days and your discretion. There are certain introductions, in the territory, to be made—certain details to be wound up—and other matters which should be given as instruction to whoever replaces me. You are aware of this, and because of it I am, therefore, leaving the time limit up to yourself.

“I have not, and will not, announce the fact of my leaving to any customers of the firm until the end of an agreed notice.

“Very truly yours,

“EDGAR V. HAWKINS.” [210]

Q. Did you receive a letter from Mr. Hawkins on January 4, 1949?

A. Yes, sir, the letter was written on the——

Q. Is this the letter that you refer to?

A. Yes, sir.

Mr. Christin: I offer it in evidence.

Mr. Doyle: The same objection, if the Court please.

(Testimony of W. Ray Montgomery.)

The Court: Admitted subject to objection.

The Clerk: Defendant's Exhibit C in evidence.

(Letter dated January 4, 1949, Hawkins to Montgomery, was marked Defendant's Exhibit C in evidence.)

DEFENDANT'S EXHIBIT C

Arcadia, California,
January 4, 1949.

Dear Fred and Ray:

I was, to say the least, quite surprised to hear from Jack last evening; and more so, to hear what he had to say. I am sorry that my telephone conversation, necessarily brief and constrained, was not better understood or interpreted, by Ray. A certain amount of apparent bitterness might not have occurred if a better understanding of my remarks had been gotten. I realize, further, my brief and rather brusque note did nothing to help the situation. However, my note was written under some personal stress—after all the decision it represented wasn't too easy—and with this in mind, it may not seem so disagreeable. A letter of resignation is not an easy thing to write. I fully realize that my short note was not like me. I'd rather have written full details, at the time, but my thought processes at the time it was written were not conducive to a verbose explanation. Due to a somewhat perverse streak of reasoning, or honesty, call it what you like; I could not, in my mind, commit myself to the decision at

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

which I had arrived the day the letter was written without severing our connections—first!

The chronology of the events which have transpired have been given you by Jack, I presume. I see no need to enlarge further on them.

I do wish, however, to enlarge on my telephone conversation with Ray. I believe, that under the shock of the moment, Ray did not either hear, or understand, what I said. I'll try to say here, what I was trying to convey to Ray when I talked to him. First, that I sincerely wished to do the very best job of which I was capable, for Montgomery Brothers, in the time remaining. There are certain important contacts, on other lines, which I should assist whoever takes my place to make. These, especially the utilities, are most important as you know. Both, as to how they are made—and as to who makes them! Poorly expressed as it is, even here, that is my definite wish. To do all I possibly can to make the transition caused by my leaving as smooth as possible.

Second, I expressed a desire to have a talk with Ray as soon as possible after you receive John Storkerson's letter. By this I meant to discuss Montgomery Brother's business, in this territory, with no discussion of Fenwal business. John Storkerson will discuss that. I meant that there were certain things about the above-mentioned transition which I wanted to discuss with Ray, personnel wise, for the ultimate profit of Montgomery Brothers. I expressed myself, briefly, to Jack on this—and this

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

is the discussion I wished to have with Ray. In other words, to work out the best possible procedure for the handling of these other lines for the ultimate profit of Montgomery Brothers—when I am no longer handling them. I feel, strongly, that a discussion of “pegs and holes” is in order.

My only wish, in this telephone conversation, was to convey to Ray a desire to make every minute of the remaining time count as much as possible for the organization. It can be worked out that way, and it should be worked out that way! It would be definitely unprofitable to all concerned to work it out any other way.

Frankly, I want this separation to be as amicable as possible. It can be mutually very profitable. I do not want to leave a bad taste in your mouth—and I am just as anxious to have my own mouth sweet! I do not feel that it is necessary for me to write a justification of my actions. It was my decision, and I intend to live with it. I am sorry that I couldn't have asked, and received, your council. I respect it, and respect you both—but this was not a decision which could be made in that manner. If you will sit down, calmly, and consider the following facts you will, I trust, agree with the thought expressed in the first line of this paragraph—it can be mutually profitable. Fenwal have arrived at the decision that they are no longer willing to continue as they have, and want their own office on the Coast. The reasons behind this decision are known to you, and to Fenwal,

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

and I do not enter into this phase of it at all. However, in our reasoning, accept this fact—and the loss of gross volume it entails. With this loss of volume, throw into the balance on the other side, my relatively high overhead, which under the conditions would be a liability. The balance sinks unfavorably (unprofitably) under these conditions. Now, remove my overhead. The balance moves closer to even. Then, to move the balance so that it sinks to the favorable (profitable) side please consider the good I can do the organization in my new activity. I'll cover places you don't—that's a definite certainty. I'll see people you won't, it can't happen otherwise. Please consider that Thermoswitches and heaters go together. I, certainly, will be throwing business your way—with no capital outlay on your part for this business. I fully intend to be as helpful to your organization as possible, in this new venture; and I am sure that Fenwal concur in this. I do not think that this aspect of the situation has been given any thought, to date. I respectfully recommend that it receive some.

In line with my expressed wish to be helpful, I called with Al, on Bauer today. Al is writing his own report. I will add, only briefly, to what he will say. When all the talking (and there was plenty) was over and done I felt in my mind that no definite conclusion had been reached. Therefore, I took the liberty of asking Bill Bauer the direct question as to whether we were "in or out." Bill re-

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

plied, "You'll continue to get orders." You can interpret this almost any way you wish, knowing Bauer. From conversations Herman has had with the young lady who handles their stock control it is apparent they are out of 1000W elements, or at least dangerously low. We did not receive an order for this size, in spite of almost a direct request for it. I'd judge that Bauer is still our account. However, don't underestimate the account. Purdy is gunning, for what reason I don't know. Frankly, the way it will have to be handled in my opinion, is to go Purdy's way—"hell for cheap"—and finally set him up in assembling them at this point. While at first, this may not seem a good idea, I believe if you will consider the ease which Wiegand can manufacture and ship tubes only, and the heat which is generally put on by this customer for deliveries without any lead time, it may be the best way to do it. Further, it will simplify the problem of storage, and handling, of the buffer stock it is evident will be necessary. The freight saving, on tubes alone, is not inconsiderable from Bauer's standpoint. I know that the argument regarding laying ourselves open to competition will arise when we talk tubes only. May I remind you that this vulnerability has already been established by Cutler-Hammer, with a flange attached? In fact, I might say—amply demonstrated. I say, again, everything being equal the account ought to remain with Montgomery Brothers.

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

I find only one other thing to add. This is important. Imagine the four of us in conference, and then imagine the following events. Bill Bauer pointedly looking at his watch—(indicating not inconsiderable lapse of time) then asking me what time it was, after looking at his watch again, pointedly—then, finally, announcing he had a conference with someone else coming up—(still denoting a considerable lapse of time). I got up and put on my overcoat to break it up, finally!

I, also, called with Al on Mr. Lambert at Rheem to discuss Solo Valves with which Al is not familiar. I will send you a discussion on this, through regular, office, channels tomorrow. Al seemed to be quite well acquainted here, and due to the fact he knew nothing about what was going on, didn't talk.

I had not intended, when starting this letter, to put in the above remarks, preferring to reserve them for discussion, personally, with Ray. However I think you should both be acquainted with the facts and discuss them before a personal discussion with me. Al needs training—a lot of it! He can't, or won't take it from me. I have sold him, today, under the guise of the necessity of getting Herman out of the office more, the idea of Herman meeting the persons we deal with in the San Diego area. Frankly, I feel this is the only course. Further, using the same persuasion, conveyed the same idea about the utilities, and the water softener ac-

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

counts, other than Rheem. I do not know whether you will concur in this; but it is my considered opinion that this is the only course of action which will return a profit in the long run. I have wanted to discuss this, before, but under the conditions he was hired, and instructed, could not do so. Again, I feel a discussion of "pegs and holes" is definitely in order.

You will receive, in tomorrow's mail, aircraft orders closed by me today which amount to slightly in excess of \$11,000.00. These, as far as I know, wind up the immediate business from this source. One of these orders will have some rather peculiar notes regarding pricing—due to quantity schedule. I will dictate a letter to files instructing signature of the acknowledgment be held up until this is clarified and an understanding arrived at. The order is valid, and should be entered for production immediately. In fact, you might say all the hazard of any possible misunderstanding is removed due to the fact that initial shipments, at least, will have to be stolen from other orders anyway. Because of this, there can be no hitch, on this pricing matter.

I guess that about winds it up, for now. The only thought, or thoughts, I want to leave are those of a continuing, friendly, relation between us. It will be good for us.

Very truly yours,

/s/ EDGAR.

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

P. S. You might tell Jack that crack he made about "misspelled" is wrong. Mis-typed, I can spell "introductions."

Received January 6, 1949.

[Endorsed]: Filed July 13, 1950.

Mr. Christin: It will be deemed to be read at this time.

Q. Did you go to Los Angeles shortly after the receipt of that letter? A. Yes, sir.

Q. While in Los Angeles did you see Mr. Hawkins? A. Yes, sir.

Q. Did you have any conversation with him pertaining to his resignation? Yes or no.

A. Yes, sir.

Q. What were those conversations, who was present, and where did they take place?

Mr. Doyle: The same objection.

The Court: Objection sustained.

Q. (By Mr. Christin): You came back to San Francisco? [211] A. Yes, sir.

Q. And on about the 24th of January, pursuant to telegrams exchanged between you and Storkerson, you met Storkerson at your office on the 24th of January? A. Yes, sir.

Q. Who was present?

A. My brother, Mr. Storkerson and myself.

(Testimony of W. Ray Montgomery.)

Q. State what was said at that time and place by all of you, as you now remember it.

A. When Mr. Storkerson arrived at our office my brother and I were in Mr. F. H. Montgomery's office, and after the usual "Good morning" I asked Mr. Storkerson what in the world this cancellation thing was all about and why we hadn't received an answer to our letter of January 7th written to Dr. Walter. Mr. Storkerson replied that he had brought the letter—the answer to our letter with him, and thereupon gave me the letter to read, which I did. After reading it, I handed it to my brother and waited until he had read it thoroughly. And then I said to Mr. Storkerson, "John, this letter is not based upon facts. How in the world could Dr. Walter say that our representation was not satisfactory, since when we took your account in 1942, you had practically no business out here, and we have built it up to a sizeable business of many thousands of dollars per year? That, John, is not the real reason for the cancellation. Won't you tell me the real reason?" [212]

And he said that that was, as near as he knew, the reason.

I said, "If you can't tell me the reason, I can tell you the reason. The very fact that you have taken our man, Hawkins, who had the contacts with the aircraft companies in the South and that you laid the foundation for taking this man as far back as September—you thought that it would be the easy

(Testimony of W. Ray Montgomery.)

way to take Montgomery Brothers' profit on business that we had built up, for you, for certainly you had no business before we constituted the business for you."

He said, "Ray, I am not here to fight; I am here to make a satisfactory settlement of the termination of our business relations."

So I said, "All right, John, what have you to offer in the way of settlement?"

He said, "We think that it would be satisfactory to ship all the orders we can during the termination months, which are January and February, then you turn the orders over to us after that time and we will start to bill on those orders."

And I said, "John, I don't think that that is fair, for certainly we have done exactly the same amount of work bringing these up to the order. Remember, when we receive the order that is merely the result of the many months work that we had put in with the company to get the order, and the orders that we are going to submit to you and have submitted between the 1st of January and the time that you are here are identically the same [213] as all the orders we have been sending prior to that time; that is, identically the same in this respect: that the methods of procedure of securing them were the same."

He offered an argument at that time that they would then, after they would take on the orders that we had and would send them, that they would have to do the service work.

(Testimony of W. Ray Montgomery.)

And I said, "John, in our answer to the receipt of the termination of our contract, we stated that we expected all profit on the orders that we submitted to you regardless of the date of shipment, for that was the procedure that we had done on all the orders prior to the time of termination, and that if there was any service work to be done on the order after we had received it and they had made shipment, we stood willing and ready at all times to do that service work, the same as we had done on all the orders previous to that."

We argued backward and forward as to the advisability of that. And then he asked me what I thought would be a fair settlement.

And I said, "John, before I answer that question, I will ask you a question: 'What are you going to do in the balance of the territory except the aircraft industry in the South that you are placing your own office in to service?' "

And he told me at that time that they had made no provisions.

I said, "All right, if that is the case, you certainly cannot [214] hope to have Mr. Hawkins handle all the territory that it has taken our entire organization to handle."

He said, "No, that is true, but we will have other men besides Hawkins."

I said, "Regardless—how many men are you going to have?"

He said, "We will possibly have two men, Hawkins and another engineer."

(Testimony of W. Ray Montgomery.)

I said, "They can't do it either."

He agreed with that, that they wouldn't be able to cover the same territory that we have with our entire organization. Therefore, I said, "If you will consider allowing us to handle the balance of the territory on exactly the same basis that we have been handling it previously, or to the time of cancellation, I think that that would be the basis of an argument of how we are going to handle the orders that we have now and the orders that we will receive.

Came about lunch time then, and we hadn't arrived at any decision, and shortly after lunch I offered the suggestion that he allow Mr. F. H. Montgomery and I to consult and then we would see if we could give him a proposal that would be satisfactory to us for the termination of the contract or the termination orders.

In the afternoon, when he returned to our office, I told him that if he would give us a contract, or, in other words, reinstate the contract that we had on exactly the same terms, deleting from the contract the aircraft industry in the South— [215] the aircraft industry—I would be willing to forego 50 per cent of the profit that we would have made on the shipments of any orders that we might take, or that we had—that we might take during the time between the first of January and the last of March, it being understood—he had told me previously that they were willing to pay us for all of the orders that

(Testimony of W. Ray Montgomery.)

they had sent acknowledgments for, which were the orders prior to the time of the cancellation.

He said that he was not in a position to offer such, or to give us an assurance on that, but that he would take the matter up with his principals, since he had been sent out here to make the settlement of the orders that we were receiving and would be receiving up to the end of the contract.

That consummated about the first day's conference.

The next morning when he arrived at our office, I asked him, "John, are you in a position to accept the proposition that I made?"

He said, "No, but I have transmitted it to Ashland, and I think that something can be worked out."

"Well," I said, "What do you feel? Do you think that it is fair? Because if you think it is fair, we have a pretty good chance of getting the matter settled at this time."

He said, "I can tell you and Fred both at this time that I have never yet made a recommendation to the Fenwal Company that has not been [216] accepted."

"Well, I said, "Upon the assurance that you are in favor of this, I think that the settlement can be made along the lines of our suggestion."

He then suggested that I go down to Los Angeles or meet him there, and we together call on the aircraft industry and acquaint them with the fact of

(Testimony of W. Ray Montgomery.)

this transition between Montgomery Brothers and Fenwal, and I agreed to do so.

And that just about ended the conversation in San Francisco on January 25th.

Q. Did he in that conversation state to you that he had made the appointment to meet Hawkins that night—the next night in Los Angeles?

A. He did not.

Q. Did you go to Los Angeles?

A. Yes, sir.

Q. Did you meet Mr. Storkerson in Los Angeles?

A. I met Mr. Storkerson in Los Angeles in our office.

Q. And who was present?

A. On the morning of January 27th. Mr. Hawkins, Mr. Storkerson and myself. The other employees were there, but they were not in the private office that we were in.

Q. What was said as you now recall it by the three of you?

A. The first thing I did after saying “Good morning” was to tell Mr. Hawkins that I wanted to bring him up to date, to exactly what had transpired during our meeting in San Francisco, and I [217] reiterated the proposition that we had offered to Mr. Storkerson, which was the reason that I was down there.

And Mr. Hawkins said to me that he was very glad that such a settlement had been made.

And I corrected him by saying that that was not

(Testimony of W. Ray Montgomery.)

a settlement; that Mr. Storkerson had agreed to put this before his principals in Ashland and had assured both Fred and myself that anything he put up to them would be accepted.

Then I told Mr. Hawkins that he possibly knew the reason for Mr. Storkerson and I being there was to make a call on all the aircraft industry to tell them of the transition and to explain to them the mechanics of how they were to handle—how the business was to be handled during this termination period; and it was decided that we would make a call on all the aircraft industry.

Q. And that conversation that day did Mr. Storkerson or Mr. Hawkins refer to the fact that Hawkins and Storkerson had met and been together the night before? Yes or no.

A. Yes, sir.

Q. What did they say?

A. I asked them about why they looked so sleepy, and they said they had spent most of the night together.

Q. Did they then state in your presence what they had discussed together the night before?

A. They were discussing the idea of Mr. Hawkins—— [218]

Q. Who said that? What was said?

A. They told me that Mr. Hawkins was going to be the manager at the new office that would be opened by Fenwal in Los Angeles.

Q. On that day did you proceed, the three of you, to call on the aircraft industry in the Los Angeles area?

A. Yes.

(Testimony of W. Ray Montgomery.)

Q. Where did you go?

A. We went to the Douglas Aircraft Company.

Q. Were all the conversations substantially the same at each place you went?

A. They were practically the same with but one exception.

Q. To save time, in substance what was said at each of the plants, and tell us what plants you went to.

A. We went to the Douglas Aircraft Company on the afternoon of January 27th and talked to the head purchasing agent and the buyer of the Fenwal equipment.

Q. Who was he?

A. Mr. Ferguson was the buyer and Mr. Doran was the purchasing agent.

Q. And who was present?

A. And Mr. Hawkins, Mr. Storkerson and myself.

Q. State what was said at that conference as you now recall it.

A. I told Mr. Doran that the reason that we were there was to apprise him of the fact that after March the 1st the Fenwal Company [219] was placing their own factory office, factory branch, in Los Angeles, and that Mr. Hawkins would be their Manager, and that we had come there to tell him that during the time between now and the 1st of March he was to place all orders that he had to give for Fenwal products in the usual manner with Montgomery Brothers, and thereafter he was to—

(Testimony of W. Ray Montgomery.)

he would deal directly with the Fenwal Company and not with Montgomery Brothers.

He asked Mr. Storkerson if that was his understanding, and Mr. Storkerson said it was. He also said that the reason that they were doing that was because they thought they would be able to get better service by factory supervision trained engineers than we had been able to give.

And Mr. Doran said, "I have had no occasion to complain of the service that you have given up to date."

Q. Now tell us where you went. Was that the only call you made that day?

A. That was the only call we made on the afternoon of January the 27th.

Q. And did you three meet the next morning again, the 28th?

A. Yes, sir; and we went to the North American Company—to the Northrup Company, where we repeated nearly verbatim the same thing that we had told to Douglas. Then it became lunch time, and after lunch we went to the Lockheed Company, Lockheed being one of our largest customers. [220]

Q. And whom did you meet there?

A. We talked to Mr. McChesney, who was the head of the Division of Purchasing, in the Purchasing Department buying our equipment, and Mr. Nick Rachardi, who was the actual buyer of Fenwal equipment. Mr. Hawkins, Mr. Storkerson and myself were present with these gentlemen, in Mr. McChesney's office.

(Testimony of W. Ray Montgomery.)

Q. And in substance the same conversation was had there as had at the other aircraft manufacturing plants?

A. Almost verbatim, and after Mr. McChesney had heard our story and we talked with Mr.—and had had Mr. Storkerson acquiesce about the mechanics of the procedure, he said, “Ray, there is one question I would like to ask.”

Q. Who said this?

A. Mr. McChesney. He said, “There is one question I would like to ask you. How do you feel about this entire proposition?”

I said, “Mac, how would you feel if a company were to take—were to cancel your contract when you had developed all of their business in aircraft on the Pacific Coast? Besides that they had taken our man so that they could carry on contacts that we had paid to get.”

He said, “Ray, I just wanted to get your answer.”

Q. Now then, after your conference at the aircraft manufacturers, did you have another conference or any more conferences with Mr. Storkerson and Mr. Hawkins?

A. Yes, sir, on the morning of the 29th, which was Sunday morning, [221] I invited them to have breakfast with me at the Biltmore Hotel.

Q. And who was there?

A. Mr. Hawkins and Mr. Storkerson.

Q. And did you have a conference there and did you adjourn to a room later?

(Testimony of W. Ray Montgomery.)

A. After talking over the breakfast table, we returned to my room in the Savoy Hotel, which is directly across the street.

Q. The three of you?

A. The three of us, yes, sir.

Q. What was the conversation as you now recall it?

A. I suggested that insofar as Boeing Aircraft Company was located in Seattle and that Fenwal were going to have their office located in San Francisco, and that we still had a trained employee in the Seattle office of Montgomery Brothers equally as capable of contacting the aircraft industry as Mr. Hawkins, that I thought we should amend the suggestion that we gave in San Francisco to include our handling the Boeing account in Seattle. And after a morning's discussion it was generally agreed that that would be a good thing. So that after that meeting Mr. Storkerson was to return to Ashland to put before his principals the proposal that we had given him in San Francisco; and I had offered the change to include the Boeing Company in Los Angeles.

Q. Boeing isn't in Los Angeles. [222]

A. I offered the change that we take the Boeing Company's business and handle it.

Q. Did you have any other conferences with Mr. Storkerson in Los Angeles on that trip?

A. No, sir.

Q. Then you came back to San Francisco or stayed down there?

(Testimony of W. Ray Montgomery.)

A. I stayed down there to contact all the customers that we had to solicit the business that we could get.

Q. Then did you receive a letter from the Fenwal people dated February 4th in San Francisco?

A. Yes, sir.

Q. Is this the letter you refer to (showing paper to witness)?

A. Yes, sir.

Q. That letter indicates, as I take it, a reference to an arrangement for the determination of the adjustment of the profits, is that correct?

A. Yes, sir.

Q. And there is no reference in that letter, I take it, to any territory for Montgomery Brothers?

A. No, sir.

Q. Did you answer that letter?

A. Yes, sir.

Q. Do you remember the date of that letter?

Mr. Doyle: Plaintiff's Exhibit 11, Mr. Christin.

Q. (By Mr. Christin): Is this your reply (showing paper to witness)? [223]

A. Yes, sir.

Q. I call your attention to the fact that it states in the last paragraph on Page 2:

"On the sale at net prices to the Boeing Airplane Company on special thermoswitches or other items, whether or not in the manufacturer's catalog, the orders are to be taken in the name of the manufacturer and the sales representative is to receive a commission of 15 per cent payable as provided in Article 6."

(Testimony of W. Ray Montgomery.)

That referred to transactions being held with the Boeing people, is that correct?

A. That is correct.

May I go back to the—when Mr. Storkerson agreed to the entire proposition being put up to his principals—when he left Los Angeles it had been agreed between Mr. Storkerson and myself that on that one account, the Boeing account, they would deviate from our regular agreement or contract insofar as they insisted that all of the orders from Boeing be taken in the name of the Fenwal Company and forwarded by Montgomery Brothers directly to the Fenwal Company rather than being sent to San Francisco and our order being transmitted to them.

Q. But as to the orders from other areas they were to be on the old form?

A. Exactly the same as the contract had been in force up to the cancellation. [224]

Q. On February 14th you then received a letter from Fenwal, did you not? Is that it (showing paper to witness)?

A. Yes, sir.

Q. And that contained a draft of contract, did it not?

A. Yes, sir.

Q. And you read that contract?

A. Yes, sir.

Q. And that contract covered what territory?

A. It covered all the territory that we had previously had with the exception of Southern California, Los Angeles area.

Q. And did it provide on the handling of the

(Testimony of W. Ray Montgomery.)

business that all business would be on a new system, to wit: on a commission basis?

Mr. Doyle: If Your Honor please, I submit there is no evidentiary value in rehashing documents that are in evidence.

Mr. Christin: Very well; I will withdraw the question.

Mr. Doyle: It is quite clear that letters of February 4th and February 9th were sent and the reply of February 14 was sent.

Mr. Christin: I withdraw the question.

Mr. Doyle: They speak for themselves.

Mr. Christin: Yes, sir.

Q. Did you then answer that letter by sending a letter of February 15th? A. Yes, sir. [225]

Q. Did you ever get a reply to that letter from Fenwal? A. I don't think so.

Q. After February 13th there was an exchange of telegrams; is that correct? A. Yes, sir.

Q. Did you see Mr. Storkerson again until after the 1st of March? A. No, sir.

Q. Other than the telegrams here with reference to payment of the January and February accounts, did you have any other demand from them for payment other than expressed in those telegrams?

Mr. Doyle: What is that?

Q. (By Mr. Christin): Were you ever told by Fenwal or any of its representatives that your failure to pay one invoice or one statement would cause them to desist and discontinue business? Did anybody ever tell you that?

(Testimony of W. Ray Montgomery.)

Mr. Doyle: Objected to as incompetent, irrelevant and immaterial. What was said with reference to what non-payment would result in is unimportant. The documents in evidence speak for themselves. They call for the payment, and the exchange of telegrams speaks for itself.

The Court: He may answer subject to the objection. Answer the question.

The Witness: Will you read the question again, please?

(The Reporter read the question.) [226]

A. No, sir.

Q. Did you meet Mr. Storkerson in Los Angeles after the 1st of March? A. Yes, sir.

Q. When and where?

A. My first meeting with Mr. Storkerson in the early part of March was in the office of Mr. McChesney in the Lockheed Corporation at Burbank.

Q. That was the first time you met him after you had seen him on about the 28th of January, is that correct? A. Yes, sir.

Q. What was said at that conference at the aircraft manufacturing company?

A. Mr. McChesney on the afternoon before the morning that I was there had phoned to ask me to come out, and it was too late for me to get out there.

Q. You got out there?

A. I got out there the next morning, and talked with Mr. McChesney, and he wanted to know——

(Testimony of W. Ray Montgomery.)

Q. Just a moment. Was Mr. Storkerson there at that conversation? A. No, sir.

Q. Don't go into that. Did you see Mr. Storkerson and Mr. McChesney and Mr. Hawkins that day?

A. I saw Mr. Storkerson before I saw he and McChesney together. [227]

Q. Tell us the conversation between you and Mr. Storkerson.

A. He wanted to know from me how we would handle, or on what I would agree to do to handle the Lockheed business and all the aircraft business, and I told him that we would be very glad to assign all of our orders.

The Court: If you are going to leave early, we will take the recess now.

(Recess.)

Q. (By Mr. Christin): Tell us again the conversation about the assignments at Lockheed.

A. Mr. Storkerson and I talked about how they could continue to ship the aircraft companies, and I told him that we would be agreeable to assigning the orders that we had in their favor.

Q. And had he asked for an assignment prior to that time? A. No, sir.

Q. That was the first time he asked?

A. Yes, sir.

Q. You conceded it immediately?

A. Yes, sir.

Q. The assignments were prepared?

A. Yes, sir.

Q. And in those assignments it is provided that

(Testimony of W. Ray Montgomery.)

in the event of cancellations you would be notified?

A. Yes, sir.

Q. You were notified of it being cancelled? [228]

A. Yes, sir.

Q. And that decreases the amount of your claim here?

A. Yes, sir.

Q. You are willing to stand by that deduction from these articles that you sold, these patented switches?

A. Yes, sir.

Q. You knew they were patented through representation of Fenwal?

A. Yes, sir.

Q. Was there any other switch that you know in 1948 that could be used in lieu, in place of it, satisfactorily with the airplane companies?

A. None had been satisfactory. We practically had a monopoly on that business insofar as the switches themselves were concerned for unit fire detectors and for overheating switches.

Q. Did the Civil Aeronautics Commission have any control over the use of those installations?

A. Not the Civil Aeronautics; Wright Field had quite a little bit to do with it, and we had our fire detector approved by Wright Field.

Q. What is Wright Field?

A. Wright Field is the clearing house for all of the Armed Services planes. That is, the equipment to be used on all the planes by the Armed Services in all branches.

Q. At the time of the termination of your contract did you know [229] of any switch or switches that you could purchase to fill the requirements

(Testimony of W. Ray Montgomery.)

of the aircraft manufacturers so far as thermostatic controls were concerned? A. No, sir.

Mr. Christin: That is all.

Cross-Examination

By Mr. Doyle:

Q. Do you know how many patents there are on the various Fenwal switches?

A. I know there are several, but I don't know just how many or other than that they were patented, because nearly all the switches had that mark in the entire catalog, and also on the switches.

Q. You are familiar with the catalog?

A. Yes, sir.

Q. Do you know whose names those patents are in?

A. I have no way of knowing, but I——

Q. You understood or had heard they were in the name of W. J. Turrene, did you not, Mr. Montgomery?

A. I know that—I understood that Fenwal was working under the patents that appeared on the switch and also in their literature.

Q. And that Mr. Turrene of that company held those patents?

A. I knew that, yes, sir.

Q. None of those patents were held by you?

A. No, sir. [230]

Q. Or by Montgomery Brothers?

A. No, sir.

Q. That was true of the aircraft switches as

(Testimony of W. Ray Montgomery.)

well as the other type which you described for us here as industrial switches?

A. That is right.

Q. You say, as I recall your testimony, that you pioneered or pioneered the engineering of the aircraft switch. What did you mean by that?

A. Insofar as the unit fire detector is concerned, in working with the——

Q. Before you go ahead, as far as the unit fire detector was concerned, when was it that you started your pioneering on that?

A. I should say in approximately the year of 1944.

Q. 1944? A. Yes, sir.

Q. About what month?

A. I don't know exactly, but I would say possibly around the middle of the year.

Q. That was done by you personally, Mr. Montgomery? A. And by Mr. Hawkins.

Q. You and Mr. Hawkins?

A. And the engineers of the Lockheed Company.

Q. What month was that again?

A. I would say around the middle of the year 1944.

Q. About midyear 1944. Do I understand that prior to that time [231] there had not been any use of the unit fire detector in aircraft, so far as you know? A. Not to my knowledge.

Q. And it is your understanding that there was no use of the unit fire detector in aircraft prior to that time? A. That there was no use?

(Testimony of W. Ray Montgomery.)

A. No, "Acknowledge and advise definite shipping date."

Q. Now then, read the printed material on the right-hand below that.

A. On the right-hand below that?

Q. Yes.

A. You mean the left-hand, but I will read it.

Q. The left-hand; I beg your pardon.

A. "Unless you indicate to the contrary on your invoice, we shall discount your bills on the 10th of each month. No allowance for boxing or cartage.

"All invoices to be submitted in duplicate direct to San Francisco, together with all shipping business on day shipment is made."

Q. That is your order form, is it not? [234]

A. That is our order form.

Q. I show you two documents, your counsel has handed to me, Mr. Montgomery, and ask that you examine first this one (handing document to witness). A. Yes, sir.

Q. And I direct your attention that it says on its face, "Received, Montgomery Brothers, San Francisco, February 7, 1949," and ask if that is your receipt stamp? A. Yes, sir.

Q. Of your office? A. Yes, sir.

Mr. Doyle: I will request that the document identified be marked Plaintiff's Exhibit 32 and offer it in evidence.

The Clerk: Plaintiff's Exhibit 32 in evidence.

(Fenwal Statement referred to was marked Plaintiff's Exhibit No. 32 in evidence.)

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PLAINTIFF'S EXHIBIT NO. 32

STATEMENT

135-



FENWAL INCORPORATED
ASHLAND, MASSACHUSETTS

THERMOSWITCHES

Montgomery Brothers
1122 Howard Street
San Francisco, California

RECEIVED
MONTGOMERY BROTHERS
SAN FRANCISCO
FEB 7 - 1949

TERMS
1/10, N/30

W.R.M. ACCT. SEATTLE
A.B.C. SALES PORTLAND
F.H.M. FACTY LOS ANGELES
NOTED

ITEMIZED INVOICES WERE FURNISHED YOU WITH THE MERCHANDISE

DATE	FOLIO	DESCRIPTION	CHARGE	CREDIT	BALANCE
1-27-49	9-774		9.26		
1-27-49	9-775		9.39		
1-28-49	9-813		N/C		
1-28-49	9-815		17.36		
1-28-49	9-816		255.00		
1-28-49	9-817		N/C		
1-28-49	9-818		29.40		
1-28-49	9-819		24.81		
1-28-49	9-820		8.13		
1-28-49	9-821		23.75		
1-28-49	9-822		496.16		
1-28-49	9-823		478.56		
1-28-49	9-824		304.94		
1-29-49	9-874		249.97		
1-29-49	9-875		199.52		
1-29-49	9-876		336.60		
1-29-49	9-877		22.03		
1-31-49	9-907		N/C		
1-31-49	9-908		2890.00		
1-31-49	9-909		2890.00		30,309.84
		Total Debits	61.92		
		" Credits		12.23	
		" Invoices	30309.34		
		Total Am't. Due			30,359.53

[Endorsed]: Filed July 13, 1950.

(1)

(Testimony of W. Ray Montgomery.)

Q. I direct your attention next to the statement on the letterhead of Fenwal, Incorporated, consisting of six pages, and ask you if you identify that document as having been received on or about the date of the receipt stamp from Fenwal?

A. Yes, sir.

Q. I direct your attention to the fact that this statement bears, "Received, Montgomery Brothers, San Francisco, March 7, 1949," stamped on its face?

A. Yes, sir. [235]

Q. That indicates it was received at your office at that time? A. It does.

Mr. Doyle: This document identified is offered as Plaintiff's Exhibit 33.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 33 in evidence.

(March Statement of Fenwal was marked Plaintiff's Exhibit No. 33 in evidence.)

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PLAINTIFF'S EXHIBIT NO. 33

STATEMENT



FENWAL INCORPORATED

ASHLAND, MASSACHUSETTS

THERMOSWITCHES

TERMS
XXXXXX

Montgomery Brothers
1122 Howard Street
San Francisco, California

ITEMIZED INVOICES WERE FURNISHED YOU WITH THE MERCHANDISE

DATE	FOLIO	DESCRIPTION	CHARGE	CREDIT	BALANCE
		Total Debits	61.92		
		" Credits		91.35	
		" Invoices	48,128.04		
		Total Am't. Due			48,098.61

48098.61
46422.49
RECEIVED
MONTGOMERY BROTHERS
SAN FRANCISCO
MAR 7 - 1949
V.M.M. ACCT. SEATTLE
A.B.C. SALES PORTLAND
F.H.M. FACTY. LOS ANGELES
NOTED

[Endorsed]: Filed July 13, 1940.

(Testimony of W. Ray Montgomery.)

Q. Who had the representation of the Fenwal line out here before you took it over?

A. I think they had two representatives—Braun-Knecht-Heimann in San Francisco.

Q. Would you spell that please?

A. B-r-a-u-n K-n-e-c-h-t H-e-y-m-a-n.

Q. They are manufacturers' representatives?

A. No, sir, they are jobbers of laboratory supplies, and their subsidiary in Los Angeles is Braun Corporation. A similar type of business. The representation in the Northwest was held by a manufacturers' representative; I'm not sure, but I think it was Northwest Scientific Company.

Q. It is your understanding that those representations were terminated when the line was placed with you in 1942?

A. I don't know whether they were terminated or not; I know that we were given the—

Q. You acted for Fenwal in this territory after 1942? [236]

A. Right.

Q. And those people had acted for them previously?

A. That is right.

Q. As I understand it, however, Mr. Montgomery, you for many years had the representation of the Wiegand Electric Company of electric heaters?

A. Since about 1931.

Q. And isn't it a fact that the Wiegand people for many years prior to 1942 stocked the Fenwal Thermoswitch?

A. Not many years, no, sir; for a few years.

Q. You had, however, handled the Fenwal

(Testimony of W. Ray Montgomery.)

Thermoswitch as a Wiegand item? A. Yes.

Q. And you still do handle the Fenwal Thermo-switch as a Wiegand item today?

A. Yes. Wiegand buys the standard switches only.

Q. What other concerns do you represent in this territory besides Wiegand?

A. I represent the Iron Fireman of Portland, Oregon, on a tank thermostat used in electric water heaters. I represent the Electric Controls Company of Portland, Oregon.

Q. I was interested in the eastern companies.

A. You understand we are a Coast concern and we handle both coast products and we give them preference all we can; at the same time handled the products of the Arcless Switch Company [237] of Watertown, Massachusetts; the Commercial Filter Company of Boston, Massachusetts; and Peerless Electric Company, Warren, Ohio.

Q. Any others?

A. They are our principal lines. We handle Sauerisen Cement, which is a technical cement manufactured in Pittsburgh.

Q. You said your Los Angeles office Manager, I believe after Mr. Hawkins went down there, was Mr. Hawkins?

A. Not when he first went there, no, sir.

Q. Who was the manager?

A. My cousin, Mr. Wilmot L. Montgomery.

Q. How long did he remain?

(Testimony of W. Ray Montgomery.)

A. Until after Hawkins was there about a year, I would say.

Q. Then did he transfer to another office?

A. No, sir.

Q. He left your organization?

A. That is right; he went in business for himself.

Q. When did Mr. Herman Oswald go to the Los Angeles office?

A. After the war in 1945.

Q. 1945? A. Yes.

Q. Was he the Office Manager there?

A. No, sir.

Q. What was his position?

A. He was sent down to assist in the Los Angeles Office and [238] work under the direction of Mr. Hawkins.

Q. Is he still there? A. No, sir.

Q. Is Mr. Tomkins there? A. Yes.

Q. When was he employed?

A. Also in 1945.

Q. In 1945? A. That is right.

Q. At the Los Angeles office?

A. In 1945 or '46.

Q. He is still there?

A. Yes, sir. I think our records will show just what date each one of those went there.

Q. Subject to correction?

A. That is right.

Q. I won't hold you to the precise date on that.

(Testimony of W. Ray Montgomery.)

Was anyone employed after Mr. Hawkins left in Los Angeles? A. Yes.

Q. Who was employed?

A. Mr. Ray Gray and Mr. Ralph Dodge.

Q. How many people do you have in the Los Angeles office now?

A. At the present time or at that time?

Q. Now.

A. At the present time we have four [239] people.

Q. That is four men?

A. We have four men, yes, sir.

Q. And any women? A. Yes, sir.

Q. How many?

A. We have off and on two women.

Q. Two women? A. Yes, sir.

Q. So that you now have 6 people in that office?

A. Yes, sir.

Q. How many employees did you have in Los Angeles in 1948? Name them, if you please.

A. We had Mr. Edgar Hawkins, Mr. Herman Oswald, Mr. A. M. Tomkins, Miss Morrison, and a Japanese girl by the name of Tanaka, I believe her name is.

Q. So you had three men and two women in 1948? A. Yes.

Q. And today you have four men and two women? A. Yes, sir.

Q. How long was Mr. Conant employed by you whose name was mentioned the other day?

(Testimony of W. Ray Montgomery.)

A. He had been with us from about 1926 until he left our employ in 1949.

Q. 1949? A. Yes, sir. [240]

Q. When in 1949, if you remember?

A. May, I think, or June.

Q. Do you know where he is now?

A. Yes, sir.

Q. Where? A. In Denver.

Q. In what business is he engaged there, if you know?

A. He and another gentleman have a manufacturers' agency.

Q. Manufacturers' agency? A. Yes, sir.

Q. And he left you in May, you say?

A. May or June.

Q. Of 1949. That was four or five months after Hawkins? A. Yes, sir.

Q. What is this unit fire detector on aircraft used for that you speak of?

A. What is it used for?

Q. Yes, what is it? Just describe it. What does it look like?

A. I can show you a cut sample that will refresh my memory; otherwise I could tell you. We brought one here (producing object). This is a cutaway sample of the 17443-7 Fenwal fire detector.

Q. The outer coating differs from the industrial type which you have before you? [241]

A. Yes, sir.

Q. What other differences are there?

A. The internal construction is different.

(Testimony of W. Ray Montgomery.)

Q. The type of metal is different?

A. That is different, and also in total construction it is different, inasmuch as this is adjusted from the outside, and that is factory sealed.

Q. This is sealed at the factory?

A. Yes, sir.

Q. And the adjustments are fixed there?

A. Yes.

Q. So that the temperature tolerances are fixed at the factory?

A. So that they cannot change after it is on the job unless the change is made at the factory. We sell them with a guaranteed tolerance.

Q. So that it leaves the Ashland factory on the way to the airplane factory sealed and cannot be changed as to tolerance? A. That is right.

Q. What is that metal in there?

A. The straight metal?

Q. Yes.

A. I would say it is entitled a metal alloy; I don't know.

Q. You don't know what that metal is?

A. I have a good idea, but I am not sure.

Q. You don't know? [242]

A. There are many kinds of alloys to be used for that particular thing; that one would have to be tested to tell the exact mineral content.

Q. Under the figures you gave us yesterday—and these are just approximations; you may refer to the list you had with you yesterday, if you wish, Mr. Montgomery—in 1942 your profit on the sale

(Testimony of W. Ray Montgomery.)

of Fenwal products was about \$8000.00; is that correct?

A. If I checked that, I could tell. I gave you the purchase price and the selling price; it would be the difference between the two.

Mr. Doyle: I did some very difficult arithmetic to get these approximate figures.

Mr. Christin: May he have these before him?

Mr. Doyle: Certainly.

A. I can give it to you pretty close, yes, sir.

Q. In 1942, to repeat, your profit was about \$8000.00?

A. That's right.

Q. And in 1943 it was about \$18,000.00?

A. Well, between \$17,500.00 and \$18,000.00.

Q. In 1944 it was about \$8000.00?

A. About that, yes, sir.

Q. Pardon? A. Yes, sir, that is right.

Q. In 1945 it was about \$64,000.00? [243]

A. That is about right.

Q. In 1946 it was about \$91,000.00?

A. That is about right.

Q. In 1947 it was about \$55,000.00?

A. '47? About that.

Q. In 1948 it was about \$90,000.00?

A. That is right.

Q. Then what was your profit in January and February of 1949 on the merchandise which was shipped to you by Fenwal represented by the two statements you have just identified, totaling approximately \$47,000.00? You didn't yesterday give

(Testimony of W. Ray Montgomery.)

us the sales figures on the January and February shipments.

A. I think that is in our complaint. That covered the difference, or it is in a breakdown we gave you.

Q. I would like to have your testimony on it, if you recall it.

A. I can't tell you exactly. I could look at the statement that we submitted to you and give it pretty clearly.

Q. You are unable to state; perhaps during the recess you can determine what your selling prices on the shipments received in January and February were.

A. I could check our books and let you know this afternoon. Chances are that we will have time to get it.

Q. Do that, please.

Mr. Christin: You mean the amount of the unpaid bills? [244]

Mr. Doyle: Yes; we know what the price to Montgomery from Fenwal was; it was the amount of the unpaid bills. What I want to know is what Montgomery sold it for.

Mr. Christin: You have that, haven't you?

Mr. Doyle: I think not. I am asking what that figure is.

Mr. Christin: All right. What do you want him to get? The profit? You used the word "sales" in your question.

Mr. Doyle: On the basis of this, the profit is

(Testimony of W. Ray Montgomery.)

the difference between what Montgomery paid Fenwal and what Montgomery sold the items for.

Mr. Christin: That is correct.

Mr. Doyle: We know what Montgomery was supposed to pay Fenwal in January and February, and I want to know what they sold that merchandise for so that we can determine the profit on it.

Mr. Christin: You have that. Hawkins has that. I gave you this a week ago, if that is what you want.

(Handing document to Mr. Doyle.)

Go to the last page. Give it to the witness. I will hand you this. Maybe you can answer the question.

Q. (By Mr. Doyle): Just to simplify it, Mr. Montgomery, the total purchases by you from Fenwal in January and February were about \$47,000.00; is that correct?

A. The total—— [245]

Q. January and February shipments, 1949?

A. Were about \$49,000.00, you say?

Q. \$47,000.00.

A. I should say that is about the right figure.

Q. What did you sell that merchandise for that was shipped in January and February, 1947?

A. That is a matter of accounting. I would have to go through this whole thing to break it down, because this particular breakdown we have here, it is all in here.

Q. Then your testimony still is that you are

(Testimony of W. Ray Montgomery.)

unable to give me the figure; you will do so after lunch?

A. Until after I get it from our bookkeeper.

Q. Very well. As to the orders received before the end of February, 1949, for delivery after February, 1949, you claim a profit on them of about \$38,000.00, which, as you say, has been reduced somewhat by the cancellation of some orders?

A. Yes, sir.

Q. And that was the amount that you were claiming as profit when Mr. Storkerson came to see you in San Francisco?

A. Not at that time, no, because at the date he was there in—was on the 24th day of January, and we received many orders between the 24th day of January and the last day of February.

Q. Of course you did, but in principle you were claiming the profit on all orders for future delivery, and it now works out that that amount was about \$38,000.00 less cancellations? [246]

A. That is right.

Q. So that is what you and Mr. Storkerson were talking about when he came to San Francisco?

A. That is right.

Q. You were endeavoring to resolve that dispute? A. Yes, sir.

Q. You have told us in detail about that conversation? A. That is right.

Q. He said yesterday when he left San Francisco under the arrangement that he thought he had

(Testimony of W. Ray Montgomery.)

made with you here you were about \$3000.00 to \$4000.00 apart on those figures. Was that correct?

A. That would be altogether an assumption on his part. He had no facts to base that on due to the fact that he didn't know at that time what it was going to be.

Q. Looking back, taking the \$38,000.00 figure and using it backward, in January if you applied the formula that you were talking about in San Francisco that day, you would have gotten a profit of approximately \$4000.00 less than the amount you were claiming; is that correct?

A. I don't think so.

Q. Well, what profit would you have gotten on the formula you discussed that day?

A. The formula that we discussed that day was not a formula of determining our profit. We discussed, as I have testified to here just a few moments ago, that we expected all the profit on [247] all the orders that they had with deferred shipping dates and on all the orders that we would take between the months—between the 1st of January and the last of February regardless of when the merchandise would be shipped.

Q. I understand that, Mr. Montgomery.

A. That is what we were talking about.

Q. You and I have agreed that that would be about \$38,000.00 less cancellations?

A. That is right.

Q. So we are quite clear on that. I want to

(Testimony of W. Ray Montgomery.)

know if that was reduced to a formula at that meeting?

A. We had no formula unless he can look in a crystal ball.

Q. Well, it was understood that you would get all of your profit except that in part it would be reduced by 50 per cent, isn't that what you told us earlier; that you would forego 50 per cent of your profit on some of these orders?

A. Provided he would acquiesce to giving us all of the territory on exactly the same basis that we had it prior to that time.

Q. I understand that you were endeavoring to link a new contract for the northern territory with your bargaining on the amount of your profit; but linking those two together and giving up 50 per cent of your claimed profit, how far apart were you when he left San Francisco?

A. We had no way of knowing when he left here on January 24th, because we still had almost two months to go. [248]

Q. In any event, the formula, if there was one, was all of your profit on all orders and 50 per cent of your claimed profit on orders in the Los Angeles territory; was that about it?

A. That is what it turned out to be, but he certainly didn't know, and I am sure that I had no idea of the number of orders that we were to receive and what our profit would be.

Q. That was the basis upon which you were considering resolution of the difficulty?

(Testimony of W. Ray Montgomery.)

A. The basis that we were arguing with was the basis that I have outlined several times: That we would forego 50 per cent of the profit on the merchandise shipped after March 1st for aircraft orders provided we received a contract that would give us the same coverage and right that we had had all this time to handle all of the territory on the Pacific Coast on standard switches and the aircraft industry of the Boeing Company in Seattle. That was what the agreement was that he was to submit, and that is what we were arguing about.

Q. What part of your business was represented by Fenwal sales in 1948?

A. I couldn't answer that question to the last dollar, but it was a substantial amount.

Q. Well, approximately percentagewise?

A. I think the total amount—I can run this figure up pretty easily—of the Fenwal business was—in 1948, the total amount was some \$356,920.44. [249]

Q. Yes, we have that figure. That was your gross purchases. And your gross sales?

A. 482; that was our gross sales.

Q. Your spread was \$90,000.00. I want to know what percentage of your total business that represented.

A. I should say that represents about a third.

Q. About a third of your total business?

A. It might be a little more than that.

Q. And in 1947 when your profit was \$55,000.00,

(Testimony of W. Ray Montgomery.)

what percentage of your total business did it represent in that year?

A. I have no way of knowing unless I look at the figures.

Q. You couldn't even guess?

A. I wouldn't want to hazard a guess.

Q. You have got your books available here?

A. Yes.

Q. Mr. Roche is your bookkeeper and auditor, is he not?

A. That is right.

Q. Or Mrs. Roche.

A. Mrs. Roche.

Q. And those books are under her control?

A. Yes, sir.

Q. In 1949 how did your business of Montgomery Brothers over all compare with 1948? Was it off or——

A. It dropped down a certain amount of business that we would have gotten for Fenwal [250] Company.

Q. That wasn't my question. I want you to tell me how much your gross business was in 1949.

A. I would have to refer to our books to tell you.

Q. You are unable to tell us now whether it was more or less than in 1948?

A. I am unable to tell you accurately. There may be a difference of a few thousand dollars; it may be 50 or 75.

Q. Is it your testimony that it was more or less in 1949 than in 1948?

A. My testimony is that I don't know.

(Testimony of W. Ray Montgomery.)

Q. You will find out?

A. I can find out, yes.

Q. If it was less, was it substantially less?

A. I will find that out, and let the figures speak for themselves.

Q. You are unable to state whether your '49 business was more or less than the '48 business, is that right?

A. I am not in a position to answer that question intelligently.

Q. You are unable to answer it, is that it?

A. Because I would have to have the facts before me before I gave you the answer.

Q. I just want your recollection as to whether in 1949 you did more or less business than in 1948. Do you have no recollection on the subject?

A. I don't know whether it was better or worse. We do a substantial [251] amount of business; I can't very well carry these figures in my head all the time.

Q. With respect to the business of your Los Angeles office, and only your Los Angeles office, are you able to tell me whether it was greater or less in 1949 than in 1948?

A. It was considerably less.

Q. How much less?

A. That, I can't say again.

Q. You have those figures in mind, haven't you?

A. I haven't the figures in mind, because as manager of this company I am looking to the different territories from the standpoint of results;

(Testimony of W. Ray Montgomery.)

I don't look at them from the standpoint of dollars and cents as much as I do the overall picture. I know that they did less business in '49 than they did in '48; how much less, I don't know, because I have been trying to bolster the sales up.

Q. As to your overall, you don't know whether you did more or less in '49 than in '48?

A. I will have to check that up.

Mr. Christin: We have that here.

Mr. Doyle: The total business?

Mr. Christin: Yes.

Mr. Doyle: Let him check on it at lunch.

Mr. Christin: May we have the adjournment now?

The Court: Yes.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [252]

Thursday, July 13, 1950—2:00 o'Clock P.M.

W. RAY MONTGOMERY

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Doyle:

Q. You were going to obtain for us, Mr. Montgomery, the figures on the 1949 business of your concern as compared with the 1948 business. Did you obtain those? A. Yes, sir.

Q. Will you state them, please?

(Testimony of W. Ray Montgomery.)

A. In 1948 our total sales were \$1,308,081.78; in 1949 our total sales were \$813,772.34.

Q. Gross sales? A. Yes, sir.

Q. What was your net in the two years?

A. Sir?

Q. What was your net in the two years, the difference between cost and sales?

A. You didn't ask for that and I haven't it available.

Q. Did I understand you to say that in the Los Angeles office you have now four men or three?

A. We now have four.

Q. That is one more than you had when you had the Fenwal line? A. Yes, sir.

Q. You were to give us also the January and February profit [253] on the purchases made in those two months from Fenwal—that is 1949?

A. I have that, yes. In January the profit on the Fenwal sales was \$8,517.20, and in February \$4,362.58.

Q. Are the purchases from Fenwal in January roughly \$30,000.00?

A. In January were \$28,044.16.

Q. On which the profit was \$8,000.00?

A. That is correct.

Q. And in February the purchases were \$17,637.17?

A. On which the profit was \$4,362.58.

Q. What was Mr. Hawkins' salary in 1948?

A. That was on a memorandum that we had here the other day.

(Testimony of W. Ray Montgomery.)

Q. Do you recall what his salary was per month?

A. In 1948 his gross——

Q. I asked you for his monthly salary.

A. I gave you that the other day. I can get it again.

Mr. Christin: You have the memorandum I gave you of that?

A. I haven't it here, I don't think; but I read it the other day from a memorandum.

Q. (By Mr. Doyle): Your testimony was that his gross compensation in 1948 was \$10,250.00?

A. That is right.

Q. Now I would like to know what his salary was.

A. I had it on that same memorandum, but I don't seem to have the memorandum here. If you can find that memorandum I can give [254] it to you.

Q. Does it accord with your recollection that it was \$300.00 a month?

A. I think it was a little over \$300.00. It must be in the record.

Q. I think it is in the record, the gross figure; the gross figures for each year are in the record, on the examination of your counsel, Mr. Montgomery, but the monthly salary wasn't.

Mr. Christin: I think it is in the deposition.

Mr. Doyle: I believe it is at Page 67 or 68. Perhaps you would refresh this gentleman's recollection by letting him see that, Mr. Christin, so that he can testify for the record.

(Testimony of W. Ray Montgomery.)

Mr. Christin: I had it on a piece of paper; I will try to find it. Didn't we give you a memorandum of it?

Mr. Doyle: No, you didn't or I wouldn't be asking for it.

Mr. Christin: I meant at the time of the deposition.

Q. Look in there; read that carefully; that will give it to you (handing deposition to witness).

A. You want to know his salary in 1948? Again, this doesn't give his salary; it gives the gross income.

Mr. Christin: If you will read on you will find it is broken down.

A. The salary was \$3750.00.

Q. (By Mr. Doyle): In what year?

A. For 1948. [255]

Q. In 1948?

A. Yes, sir, according to this document.

Q. What was it in 1947?

A. The salary was \$3600.00.

Q. In 1946? A. \$2400.00.

Q. In 1945? A. The same.

Q. In 1944?

A. It doesn't say, but it must have been the same.

Q. In 1948 was there a bonus arrangement?

A. Yes, sir.

Q. When was that paid?

A. It was given with a Christmas letter.

(Testimony of W. Ray Montgomery.)

Q. Was there any understanding about a bonus in the year 1948? A. No, sir.

Q. That was paid in your discretion at the end of the year? A. Yes, sir.

Q. Was there an understanding about a bonus in '47? A. No, sir.

Q. But one was paid at Christmas time?

A. Yes, sir.

Q. In addition to the monthly salary?

A. Yes, sir.

Q. Was there any understanding about a bonus in 1946? [256] A. Yes, sir.

Q. What was that understanding?

A. He was to receive the same bonus that we had—the same percentage of bonus that we had paid in 1945.

Q. Then what was the bonus understanding in 1945?

A. In 1945, which was the end of the war year, when salaries were unfrozen, and to compensate him for the work that he had done during the war years I agreed to pay him a bonus, in place of just an amount that we would arbitrarily give, 5 per cent of the net profits.

Q. For that year? A. For that year.

Q. And was that paid to him?

A. It was, and in—

Q. 5 per cent of the net profit on what? All of the Montgomery business or Fenwal sales?

A. On all of Montgomery Brothers business.

Q. For 1945? A. Yes, sir.

(Testimony of W. Ray Montgomery.)

Q. And the same for 1946? A. Yes, sir.

Q. But no arrangement for 1947?

A. I discontinued the arrangement that we had in 1945 and '46 at the beginning of 1947 and reverted back to the same method of compensation that we were using with all the balance of our employees. [257]

Q. No understanding about a bonus?

A. No, sir, except that there wouldn't be a 5 per cent of the net profit of Montgomery Brothers in '47.

Q. It was whatever you decided to pay?

A. That is right.

Q. If anything? A. That is right.

Q. Did you have any contract with Mr. Hawkins?

A. Only on a basis of he an employee receiving from us his salary at the end of each month.

Q. And how often was he paid?

A. Twice a month, the 1st and 15th.

Q. In early January of 1949 you had a Dun & Bradstreet report on Fenwal, did you not?

A. Yes, sir.

Q. That showed the status of Fenwal's business as of what time?

A. That was a report, commercial credit report of the Dun & Bradstreet people that we received from Dun & Bradstreet after we had—after the termination notice had been sent us. We merely got it through the customary channel, asked Dun & Bradstreet for their report.

(Testimony of W. Ray Montgomery.)

Q. And as I recall your testimony on the deposition, you said that that showed a weak financial condition, you felt? A. Yes, sir.

Q. Was that true on January 24, 1949?

A. January 24th?

Q. Yes, 1949?

A. Yes, sir, as reflected by that report.

Q. That was also true, so far as you know, on February 21, 1949? A. Yes, sir.

Q. Now, you were telling us, had not completed the total percentage, or the percentage of Fenwal business to your total business; did you check that out further for the years in question?

A. I have given you the total business for Fenwal; the total sales for Montgomery Brothers in the year '49 I have also given you, and in '48 I have also given you. In '47 they were \$1,884,304.45; and in 1946 that you asked for, I gave you \$1,943,-995.81.

Q. That is '46?

A. From '46 to '49, and I have already given you the amount of business that we did with Fenwal, so that it is a very easy calculation to divide one into the other.

Q. Yes, that is right. Thank you. Did you make any special sales efforts during the months of January and February of 1949?

A. I attempted to close all the business that we possibly could before the expiration of our contract.

Q. You circularized your personnel to that effect?

(Testimony of W. Ray Montgomery.)

A. And I was also assisted by Mr. Storkerson in making the [259] rounds of all the aircraft companies in which he told me and told them to place all of their orders that they had to give to the expiration of our contract, March 1st, with Montgomery Brothers.

Q. And on that call he facilitated and helped you in that regard? A. That is right.

Q. That was when you went to Los Angeles in the end of January? A. That is right.

Q. After your discussion in San Francisco?

A. Right.

Q. What was the meeting at the Savoy Hotel in Los Angeles at the end of that week with the aircraft companies? What was the reason for that meeting?

A. The reason for that meeting that Mr. Storkerson was going to leave the Coast to go back to his factory and talk with his people.

Q. You understood he had already telephoned them? A. That is right.

Q. At your San Francisco meeting?

A. And I wanted to be sure that he was going to put the proposition up to them exactly as we had put it up to him, and at that particular meeting I asked and argued with him and he conceded, that it would be best for us to handle the Boeing account, with the one exception that the orders would be given directly from the [260] Boeing Company to the Fenwal Company and not the procedure that we had had prior to that time of the orders being

(Testimony of W. Ray Montgomery.)

given to Montgomery Brothers and Montgomery Brothers orders being given to Fenwal.

Q. To that extent were you seeking a modification of the tentative understanding you had reached at San Francisco? A. That is right.

Q. That was the only new thing that was added to the discussion at that time? A. Yes, sir.

Q. When did you first learn that Dr. Walter had seen Mr. Hawkins in September of 1948 at Los Angeles? A. From Mr. Hawkins.

Q. When? A. On January 10th.

Q. January 10th? A. Yes, sir.

Q. In your discussion with him?

A. Yes, sir.

Q. At Los Angeles? A. Yes, sir.

Q. Now, we touched this morning upon the date of payment. There wasn't any question, was there, that the regular date of payment of your account with Fenwal Company was the 10th of each [261] month? A. No, sir.

Q. It was the 10th of the month regularly as the routine business of the two organizations?

A. That is right.

Q. Did you obtain a folder of trade information from Fenwal at the time you took over their representation in 1942?

A. Will you repeat that?

Q. A folder of trade information, literature on their product and merchandise?

A. I received in '42?

(Testimony of W. Ray Montgomery.)

Q. Yes.

A. Only their regular catalogues that we give out ourselves to all our customers.

Q. Did they supply you any information concerning the merchandise from time to time?

A. From time to time they did, yes, sir.

Q. Catalogues? A. Yes, sir.

Q. And you are familiar with the publication "Fenwal Facts" are you? A. Yes, sir.

Q. What is "Fenwal Facts"?

A. The house organ of the Fenwal Manufacturing Company.

Q. Then in addition to "Fenwal Facts" there was other literature printed and prepared by the Fenwal organization in Massachusetts which came to your hands and was distributed to the [262] trade?

A. I assume that all of the literature that they had to offer to the trade in other parts of the country was sent to us so that we could in turn give it to our customers on the Pacific Coast.

Q. That was your expectation in any event?

A. Yes, sir.

Q. Of the total sales to aircraft what was the division roughly between the continuous fire detector and the unit fire detector?

A. We sold very little of the continuous fire detector, and the only orders that we took after the first order that I took on the Fenwal continuous fire detector, which was early in the production of that particular product, I sold to Pan American

(Testimony of W. Ray Montgomery.)

Company in San Francisco, and they had a failure before they got out of the Golden Gate. From that time on I only made such sales as had been specified on Government planes, and due to the red tape of the Government, even though we admitted that it wasn't a satisfactory application, it had to be put on the planes so that they could be accepted by the United States Government.

Q. Well, when you said this morning that you pioneered or engineered the unit fire detector, did you mean the continuous? A. No, sir.

Q. You distinguish them? A. Yes, sir.

Q. And you didn't do the pioneer work on the continuous fire detector? [263]

A. I had nothing to do with the continuous except to sell it.

Q. You say that it was not a substantial part of your sales?

A. No, sir. Upon the failure of that particular proposition I developed the unit detector.

Q. You developed that in the middle of 1944?

A. Whenever that happens to be.

Q. That is your recollection, that it was in the middle of that year? A. About that.

Q. I will show you a copy of a pamphlet entitled "Fenwal Facts About Thermoswitches of Interest to Engineers" and ask you if that is the publication of which you have testified?

A. Yes, sir, that is right.

Q. And that is an example of the type of thing?

A. Yes.

(Testimony of W. Ray Montgomery.)

Mr. Doyle: I request that this be marked as Plaintiff's Exhibit Number next in order, 34.

The Court: Plaintiff's Exhibit No. 34 in evidence.

(Publication referred to was marked Plaintiff's Exhibit No. 34 in evidence.)

Q. (By Mr. Doyle): Now, I direct your attention to the fact this Plaintiff's Exhibit 34 is dated November, 1940, and that the first sentence of the first paragraph reads as follows:

"Tests were recently conducted on the Fenwal Cartridge Thermoswitch to determine its adaptability [264] as a close control for fire protection purposes. These tests were in response to a request from one of the largest aviation companies in this country. Their requirement is for an electrical control which would react in minimum time upon coming in contact with an open flame. While the tests outlined below were not conducted with an open flame they are relatively indicative of the immediate response, to temperature changes, available in the Cartridge Thermoswitch."

And I ask you whether that refreshes your recollection about the original use of the Fenwal Thermoswitch as a fire detector in aircraft?

A. So far as my recollection is concerned, the first use by any aircraft company as a fire detector was on the Constellation, or preferably on the Government version of the Constellation which was

(Testimony of W. Ray Montgomery.)

produced before the end of the war and which had been engineered and tested prior to the death of Miss Amelia Earhart, because she and Art Hughes were the ones that used the flying laboratory, and at that time that was to my knowledge the first use of a unit fire detector.

Q. Mr. Montgomery, don't you know that Curtiss-Wright was using fire detectors in their planes at Buffalo in 1941? A. No, sir.

Q. Would you deny that that is so? [265]

A. I don't know anything about Curtiss-Wright activities in Buffalo. I do know that Curtiss-Wright was using an overheating switch in their airplanes in 1941.

Q. A Fenwal Switch?

A. That is right, but that was merely a temperature device the same as you have on your automobile to show that the radiator temperature or water temperature of the engine is increased over what it should be.

Q. Do you know whether the Lockheed Company at Los Angeles was using a Fenwal switch as a fire detector in 1941?

A. That they were using it?

Q. Yes. A. I had no knowledge of it.

Q. Do you know whether engineering work was done in that year upon the use of the Fenwal Thermoswitch in that connection?

A. That was before I had the Fenwal account, so I wouldn't know.

(Testimony of W. Ray Montgomery.)

Q. It was, however, an account of Fenwal before you took over, was it not?

A. They possibly had been selling them with the previous representative that I knew nothing about.

Q. I direct your attention to a copy of memorandum addressed to "All representatives." Incidentally, who was E. P. Griswold?

A. He was Sales Manager for the Fenwal Company, if my memory serves me right. [266]

Q. Prior to Mr. Carl Robinson—prior to the present Sales Manager?

A. That is right.

Q. I direct your attention to a copy of that memorandum dated December 17, 1943, addressed, "To All Representatives" from E. P. Griswold, and signed "E. P. Griswold, Sales Manager," and ask whether that memorandum came to you in the usual course of business between Fenwal and Montgomery Brothers?

A. I have no way of knowing, but I assume that it did, sir.

Q. Very well. Now, directing your attention to the two pamphlets attached to it, which I believe you will notice are referred to in it, do you have any recollection of ever having seen either of them before?

A. I have seen this one, yes, sir.

Q. That red catalog you have seen?

A. Yes, sir.

Q. That is a Fenwal catalog for the trade?

A. That is right.

Mr. Doyle: I will request that the documents

(Testimony of W. Ray Montgomery.)

identified be marked Plaintiff's Exhibit next in order.

The Court: Plaintiff's Exhibit 35 in evidence.

(The letter and catalogs referred to were marked Plaintiff's Exhibit No. 35 in evidence.)

Q. With respect to the red catalog, which bears on the front of it, "For Safety in Flight Fenwal Fire Detectors Unit or Continuous Types"—

A. Yes, sir. [267]

Q. That would refer to both the unit and the continuous type to which you have testified?

A. No, sir.

Q. Will you explain what it does refer to then?

A. In this particular unit it shows the picture or cross-section, cutaway picture, of a standard Fenwal Thermoswitch. It also shows a cutaway sample or picture of their continuous thermostat. But the fire detectors that I described as having been developed by Montgomery Brothers and the Lockheed Company were just as different as this as day is from night.

Q. They were different from that unit type of detector?

A. Absolutely, yes.

Q. In what respects did they differ?

A. In the modifications and type of unit we used.

Q. But this unit detector for airplane use was in use more or less from the date of that pamphlet?

A. I don't know that; I don't think there were any of them in use; I think they were offered for sale but not in use.

(Testimony of W. Ray Montgomery.)

Q. You think they were offered for sale but not in use? A. Not that I know of.

Q. I direct your attention to the date of this pamphlet. Do you recall seeing it on or about its date? A. That is in '43—10/1/43. [268]

Q. Yes. A. I would say yes.

Q. You received it on or about its date?

A. Yes, sir.

Q. And it came through the company's channels from Ashland, Massachusetts? A. Right.

Q. Mr. Montgomery, you referred this morning to assignments and to the meeting at Lockheed at which those were agreed upon early in March, 1949?

A. Yes, sir.

Q. The question of assignments of those orders had been discussed? A. As such, yes, sir.

Q. With Mr. Storkerson? A. Yes, sir.

Q. There had been no prior discussion of the assignment of those aircraft orders?

A. As such, there had been none.

Q. What do you mean by "as such," as distinguished from something that was not?

A. As an assignment of all orders. During his visit on the 24th day of January, his first proposal that I testified to this morning was that they would accept—that they would ship all of the orders that they had accepted prior to cancellation and would ship as many of the orders as we could get for shipment between [269] the time of January the 1st and March 1st as possible, and then we were to turn over those orders to them and they would

(Testimony of W. Ray Montgomery.)

carry on from that point and that we would be through as far as profit was concerned. That was his proposition which we did not accept.

Q. I direct your attention to Plaintiff's Exhibit No. 9, the same being Dr. Walter's letter to you on February 4, 1949, which I understand you say was pursuant to Mr. Storkerson's call to him.

A. Yes, sir.

Q. And ask that you read Paragraphs 2.2.1 and 2.2.2 into the record, if you will.

A. "2.2.1. Montgomery Brothers shall request permission of the customer to assign the orders to Fenwal and, if permission is given, shall assign such order to Fenwal at once.

"2.2.2. Fenwal shall bill all assigned orders and pay Montgomery Brothers as commission, an amount equal to 50 per cent of the amount they would have earned had the orders not been so assigned and had the territory contract not been cancelled."

Q. You replied to that letter on February 14th?

A. That is right.

Q. Plaintiff's Exhibit 11. I ask you to read, if you will, please, Paragraph 2.2.1 of that letter?

A. "2.2.1. On all orders where shipments are to be made [270] after March 1, 1949, in the Los Angeles area or Southern California territory, Montgomery Brothers are to request permission of the customer to assign the orders to Fenwal, Incor-

(Testimony of W. Ray Montgomery.)

porated, and if permission is given, shall assign such orders to Fenwal, Incorporated, at once."

Q. Does that refresh your recollection as to whether the assignment of those orders was discussed?

A. The terminology of "Assignments" was given for the first time in that letter from Dr. Walter. The agreement that we had with him was that we were to turn the orders over to them. The mechanics of the turnover, which he calls "Assignment," I don't think was discussed as such. It was understood, however, that they were going to do the billing after that had they accepted our proposition.

Q. Mr. Montgomery, your relationship with the Fenwal Company over the years had been an amicable one, had it not?

A. Yes, sir, to all intents and purposes, yes, sir.

Q. I understood you to inform us that you hadn't had any criticism from the Fenwal Company of your handling of their affairs?

A. Any criticism?

Q. Yes. A. You are correct.

Q. And that it came as a great surprise to you when they cancelled your contract? [271]

A. It did.

Q. And that you had never in the course of your business dealings received complaint from them about their relationship or your servicing of their product?

A. We had never had any complaint whatsoever.

(Testimony of W. Ray Montgomery.)

Q. You recall, do you not, that various representatives of the Fenwal Company from Ashland called upon you and your associates in California from time to time? A. They did.

Q. You remember that Mr. Robinson called upon you from time to time?

A. I think he was out here on two different occasions.

Q. Do you remember Mr. Turrene who held the patents on these instruments called upon you from time to time?

A. Yes, sir, I think he was out here on three different occasions.

Q. Do you recall whether upon any of those occasions any criticisms were made of your handling of that account?

A. I am positive that there was no criticism made of the way we were handling the account.

Q. Do you recall a visit of Mr. Robinson to your Los Angeles office in October of 1946?

A. Was I present at that time?

Q. I asked if you recalled the visit, Mr. Montgomery?

A. He was out there. If I was out there at that time,—I [272] can recall that I met him there, because I tried to be present at the places he would be when he was coming out here.

Q. And you did see Mr. Robinson on his trips to the Coast?

A. If he was here at that time I possibly did.

Q. Do you recall a discussion with him at that

(Testimony of W. Ray Montgomery.)

time concerning a reduction of the amount of your profit on certain items? A. In Los Angeles?

Q. At any meeting with Mr. Robinson that year.

A. I think I had a discussion with him about the reduction of the fire detector switches, but that reduction was—that conversation was held in Ashland.

Q. When?

A. At the time that the change was made—shortly after it was made, from a net of 20 per cent to a net profit of 15 per cent.

Q. Did he request that change?

A. We were discussing the idea of securing more profit on all their lines, and that was in the settlement. We came to an agreement that we would give and take. We received—we took a reduction in that particular case and an advance in other amounts of profit.

Q. When was that?

A. I would have to check the date of the change of prices; that would tell about the date. That was a meeting that I had at Ashland, and the date would settle whether it was in the Fall [273] or the Spring, because I made ordinarily a couple of trips a year.

Q. Of what year? '46?

A. I wouldn't know until you show me——

Q. It wasn't '48, the last year of the contract?

A. That we made that change?

Q. Yes. A. I wouldn't know that.

Q. You don't remember when it was?

(Testimony of W. Ray Montgomery.)

A. I remember the conversation, but the exact date I can't give you.

Q. Did this relate to the so-called 17,343-6 fire detector?

A. That's right; that was the one that we reduced from 20 per cent profit to Montgomery Brothers to 15 per cent by mutual agreement.

Q. That reduction was made?

A. That is right.

Q. Did Mr. Robinson express any dissatisfaction with the representation at that time?

A. He didn't to me.

Q. Did you?

A. Dissatisfaction of us?

Q. Yes, with the relationship?

A. I don't understand that question.

Q. You were asked for and gave a reduction in your profit. [274] Did you express any dissatisfaction about it or about the relationship?

A. After the argument that we had, we will say after the decision had been reached, when I was trying to raise prices and he was trying to lower the prices, we finally came to a mutual agreement of raising some and reducing others, and we reduced one and raised I think, two or three.

Q. Did you express dissatisfaction with the situation in the course of that discussion?

A. I didn't like the idea, if that is what you mean—I didn't like it at all; I didn't like the idea of him reducing our amount, but I conceded to it

(Testimony of W. Ray Montgomery.)

at the moment they agreed to give me a longer profit on some items than I had been getting.

Q. Do you remember a visit of Mr. Robinson made to San Francisco in the Autumn of '47?

A. I think I do, yes, sir.

Q. Do you remember that he sent you a report on his return to Ashland?

A. Yes, sir.

Q. About that trip to California?

A. That is right.

Q. I show you, Mr. Montgomery, a copy of a letter dated August 26, 1947, addressed to Montgomery Brothers, attention F. H. Montgomery, and Mr. Ray W. Montgomery, signed Fenwal, C. J. Robinson, and ask you if that was the communication transmitting [275] the report and if the report attached to that is the report you received?

A. Yes, sir.

Mr. Doyle: I request that the document identified be marked Plaintiff's Exhibit 36, offered in evidence.

The Clerk: Plaintiff's Exhibit 36 in evidence.

(Letter Fenwal to Montgomery, August 26, 1947, and attached report, marked Plaintiff's Exhibit No. 36 in evidence.)

(Testimony of W. Ray Montgomery.)

PLAINTIFF'S EXHIBIT No. 36

August 26, 1947

(dictated August 25, 1947)

Montgomery Brothers, San Francisco

Mr. C. J. Robinson

Report on West Coast Activities

Attention: Mr. F. H. Montgomery and
Mr. W. Ray Montgomery

Dear Ray and Fred:

Mr. Turenne and I and our wives wish to thank you very much for the courtesies which you extended to us on our recent trip. We all certainly appreciate it and you can rest assured that we are looking forward to a return visit.

As I advised you in a recent letter, I have been working on the attached report covering the West Coast activities. I feel that the facts as set forth merit attention for our mutual interests.

Very truly yours,

FENWAL INCORPORATED,

C. J. ROBINSON,

Sales Manager.

CJR:dd

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

August 26, 1947

(dictated August 25, 1947)

Montgomery Brothers, San Francisco

Mr. C. J. Robinson

Report on West Coast Activities

Attention: Mr. F. H. Montgomery and
Mr. W. Ray Montgomery

Montgomery Brothers—Seattle Office

I was very much interested in meeting the personnel of your organization in this office. I feel that your headquarters are adequate, and that considerable work can be done for Fenwal in this sector.

Every effort should be made to cultivate Dick Reed's interest. He has expressed a desire himself to learn more about the functions and applications of Fenwal Thermoswitches. Naturally, he is just getting his feet on the ground, and I feel that he is quite definitely a valuable asset to your organization. However, with the expanse of territory you have in this sector, it is advisable that you add one or two more sales engineers to your staff if possible. I do not feel that this sector has been adequately covered, either from the standpoint of manufacturers or industrial users. A great deal of hard work will have to be done in order that the business can be developed. I discussed with Dick Reed many possible applications for Fenwal Thermoswitches in

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

industry and pointed out to him that there was an unlimited field for Fenwal Thermoswitches in the control of temperature and the detection of temperature. Naturally, however, it takes time to ferret out all of these applications. I feel that Spokane can be developed as a good market for Fenwal Thermoswitches if time and effort are expended in this direction.

I also feel that considerable time and effort should be spent at Boeing, since it is evident that they are at present one of the aircraft companies which have contract planes to build, and consequently should be worked with from all directions. It is my further opinion that even though the Edison Fire Detector System is specified on the planes which they are manufacturing, constant hammering will bring them around to realizing the definite merits of our Fire Detector over Edison.

Dick Reed and I made a call to the Kenwood Motor Corporation. This is another account which merits attention. While the preliminary call was merely one of getting acquainted, more calls should be made as follow-ups, and actual work done with the prospect.

It was also noted that very few Fenwal Thermoswitches of the standard type were stocked in this sector. It is my opinion that more standard Thermoswitches should be held in stock in order that Dick Reed will have something to work with for immedi-

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

ate installation and as business develops, over the counter sales will result.

As you know, we had a very interesting luncheon with two of the scientific sales outlets in Seattle, and any assistance which can be given them to stimulate sales through their organizations should be exploited.

I feel that as you increase the organization in this sector, it would be wise to delegate full responsibility for Fenwal to one of the sales engineers who would specialize on our account. In this way, more concentrated effort can be directed to the account in general. It is suggested that with Dick Reed's experience in aircraft, he be set up tentatively to specialize on Fenwal Thermoswitches.

Montgomery Brothers—Portland Office

In discussing the sale of Fenwal Thermoswitches with Bob Hermann, I felt that he is limited because of the territory he has to cover alone. I do not know whether you are grooming his assistant in the office to eventually work in the field. I sincerely hope that you are contemplating adding more personnel to the staff in Portland. Through the addition of personnel, greater coverage can be given to this sector, particularly to industrial sales and the ferreting out of manufacturers. I spent considerable time with Bob going over the entire Fenwal line, manufacture, operation and application of Fenwal Thermoswitches, and I sincerely hope that our discussion will be mutually profitable.

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

I also noticed that there was a very limited stock of standard Fenwal Thermoswitches in Portland. While I appreciate that shipments can be made from San Francisco and Los Angeles, it would still be advantageous from a sales point of view to have a reasonable quantity of Fenwal Thermoswitches for over the counter sales or immediate delivery to potential customers. A search of the sales records at Portland should indicate the most popular types of standard Thermoswitches which heretofore have been sold in that territory. Industrial selling, naturally, will lead to probably more special type Thermoswitches. However, the greatest amount of industrial sales can be adequately taken care of with the standard type.

Montgomery Brothers—San Francisco Office

I was very much impressed with the arrangement of things which you have in San Francisco. You certainly should have very beautiful offices when your modernizing program is completed. It was unfortunate that we were not able to cover the entire San Francisco sector and make more personal calls.

I know that you are contemplating adding to your staff, and such additions should, through effort, increase sales. It is agreed that more effort should be placed on the increase of industrial sales to broaden our application scope and increase the number of Fenwal users. Since San Francisco appears to have several manufacturing accounts, it is apparent that

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

considerable sales engineering work should be done along these lines, even to the point of reconverting some of these manufacturers now using other types of thermostats to the use of Fenwal Thermoswitches.

We feel quite certain that you can move a considerable quantity of our Appliance Thermoswitches with many of these manufacturers. It should be pointed out, however, that caution should be exercised, depending upon the type of application encountered, and the sale of the standard type Thermoswitch is often the best decision, the Appliance Switch having a certain limited range and flexibility.

We also feel that someone in the San Francisco office should specialize on the sale and application of Fenwal Thermoswitches. We sincerely trust that you agree with us in this matter.

Montgomery Brothers—Los Angeles Office

As you realize, the greatest amount of work done on the West Coast from the point of time expended was in Los Angeles. We feel that Edgar Hawkins is doing a very good job in contacting aircraft companies. I do feel, however, that lack of coverage has been due, in part, to wartime conditions. I feel that by increasing the personnel in this office, you have now relieved Edgar of a great deal of responsibility which he had to accept during the war. This, of course, will immediately release him for greater sales effort and customer contact.

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

I made an agreement with Edgar which I trust will meet with your approval, that they have permission to screen any Fenwal Thermoswitches which are returned to them for variance in temperature calibration, lack of temperature control, etc. I cautioned him, however, not to take the responsibility on himself for Montgomery Brothers or Fenwal by recalibrating such Thermoswitches and returning them to the customer. We still feel that we wish to be directly responsible, and I pointed out to Edgar, that many times recalibration of the Thermoswitch is not the entire answer. We would like to see the Thermoswitches which, through his screening, prove to be out of temperature setting. Our inspection of them might show an error in our manufacturing process.

I was quite disappointed that we did not cover more territory in and around Los Angeles, however, conditions made this somewhat impossible, and it was considered advisable to correct some errors and misunderstandings with the aircraft companies. We feel that we accomplished this and probably on our next visit, we will have more opportunity to work with other types of manufacturers and industrial users.

I believe you advised us that Edgar Hawkins is specializing on the sale and application of Fenwal Thermoswitches. We certainly are going to do everything possible to cooperate with your entire

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

organization in furnishing you the answers and service which you require.

I noted on our visit to San Diego that very little work, if any, had been done with any type of manufacturer or industrial user other than the aircraft manufacturers. I feel it advisable that more effort be placed in contacting potential manufacturers and industrial users in San Diego, along with a planned program for the same in Los Angeles.

Summing up the visit to your territory, I am impressed with the personnel in your offices. I sincerely hope that those additions which you contemplate making to your organization will be of the same calibre. I feel that Fenwal, through the program which is now in process, can render you considerable service and assistance in producing sales. This program is devised to furnish all of our representatives with more practical and technical information regarding the sale and application of our Thermoswitches. This will be conveyed to you in the near future through the medium of a Sales Manual and supplementary additions. This is entirely separate from the already existing General Sales Letter messages.

I felt through the entire territory that there was not attention given to the distribution of catalogs to the proper places. We found several instances where the personnel visited had not received the latest Fenwal catalog. This is most alarming and disappointing. I trust that you will take steps to

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

correct this. As previously suggested, the leather cover catalog should be forwarded to all head purchasing agents and outstanding companies. The paper bound catalog can be used for general distribution. I can well appreciate that there are certain instances where catalogs such as ours would be wasted. I think we are in agreement on this point. However, I did definitely note many important places visited had not even heard of our latest catalog. Please see that catalog distribution into the hands of customers and prospective customers becomes a planned program.

I also noted that our name is not lettered on the door or window of all of your offices. We certainly feel that accounts such as ours should be announced to the public passing by or entering your offices. I am pleased to note that you have listed yourselves as our representatives in all of the telephone directories. It was also quite forcefully called to our attention by the Chief Engineer of one of the aircraft companies that while Montgomery Brothers' calling card was very attractive, it did not indicate who they represented, and we were required to leave Fenwal calling cars to indicate that Montgomery Brothers and Fenwal are closely associated. Won't you please take steps to correct this. We feel that probably all the companies you represent can be printed on the back of your calling cards, or that you might have special calling cards for each account, to be distributed where it will do the most good. Certainly

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

the situation referred to above was somewhat embarrassing for both of us.

I would again like to point out to you that more standard Thermoswitch stock should be allotted to the Seattle and Portland territory in order that service to customers can be accelerated. I would also like to point out to you again that we can be of assistance to you. We can appreciate your not wanting to bother us with all sorts of details, however, I am of the opinion that, in some cases, we should be consulted until our overall information program gets into full swing.

In reviewing your present method of handling all correspondence through the San Francisco office, I would like your opinions on how we can speed up our service to the customer. It was very definitely impressed upon me by the aircraft companies, particularly Lockheed, that they feel that the present method of handling the business is too slow, and they would like permission to work with us directly. Naturally, I told them that we would prefer to follow the present procedure, and that we and Montgomery Brothers would make every effort to speed up answers to their questions and problems. Along this line, I feel that we should send you, in addition to the originals of correspondence, two additional copies which you can forward directly to your branch offices upon receipt of the general mail. This certainly should save a lot of copying and clerical work on your part, and should accelerate service.

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

I would also appreciate your thinking on the possibility of allowing your branch offices to deal with us directly regarding applications, at certain times, sending copies of their letters to you. I cannot help but think that the personnel in your branch offices would at times appreciate direct contact, and see no reason why, except in rare instances, such a procedure cannot be developed. Your comments on this will be appreciated.

In closing, I feel that with your present organization, plus the additions which you intend to make, you should be able to give excellent coverage of our account on the West Coast. It must be remembered that the aircraft industry is at present nowhere near as productive as during the war. They are, however, all designing new planes. We certainly hope that your contact with them will be at the point of original design so that Fenwal may be specified and called out on the first experimental models. We do not feel that you have always contacted experimental design until it has been too late, then double effort must be expended to change specifications. I also feel that far more work can be expended in furthering the sale to manufacturers of original equipment and industrial users. This, as you can appreciate, is the backbone of our business, and we are particularly interested in increasing the volume sales of standard Thermoswitches and increasing the number of customers using a few Thermoswitches for their industrial processes. We suggest that you

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

review the increase of industries on the West Coast over the past year. I feel you will be quite startled at the quantity. Certainly all of these have not been contacted, and when contacted, the business which results should be very satisfactory. We are indeed looking forward to your increased concentration on our account and assure you of our continued cooperation.

C. J. ROBINSON,
Sales Manager.

CJR:dd

S.F.-3 copies

cc: Mr. Storkerson

[Endorsed]: Filed July 13, 1950.

Q. (By Mr. Doyle): Did you reply to that communication?

A. I should say that we did.

Q. I show you a letter on the letterhead of Montgomery Brothers dated September 11, 1947, attention Mr. C. J. Robinson, "Dear Robbie," and ask you if that was the reply?

A. That was the reply that was sent by my brother to Mr. Robinson.

Q. After discussion with you of the report addressed to both of you? A. That is right.

Mr. Doyle: I request that the document be marked Plaintiff's Exhibit next in order.

(Testimony of W. Ray Montgomery.)

The Court: Plaintiff's Exhibit No. 37 in evidence.

(Letter dated September 11, 1947, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 37 in evidence.)

PLAINTIFF'S EXHIBIT No. 37

Inter-Office Correspondence

September 11, 1947

From: Montgomery Brothers, San Francisco 3

To: Fenwal, Inc.

Subject: Report on West Coast Activities

Attn: Mr. C. J. Robinson

Dear Robbie:

This will acknowledge and thank you for your report of August 26th, which has been carefully perused by not only ourselves, but other key men in our organization, and it is the concensus of opinion that your trip to the Pacific Coast was really worthwhile, and will be productive of good results. We like constructive criticism and by working together we are satisfied that profitable results will manifest themselves in the not too distant future.

In regard to our method of handling our business on the Coast, insofar as getting prompt action, information and other pertinent data to our customers, I can assure you that if you will give us

(Testimony of W. Ray Montgomery.)

complete, accurate and prompt attention to every inquiry that we make, insofar as shipping, prices, engineering data, etc., we will get the information to our customers and everybody will be happy and satisfied.

We have written you no less than five or six letters, trying to get shipping information for the aircraft companies over a period of many weeks, and when we did get a promise or information, many times it was not correct, or you were unable to live up to the information you gave us, so naturally this caused dissatisfaction.

If you will do your part, we can assure you we will do ours, and as we have teletype machines ordered for our Pacific Coast offices we will be in constant contact with them, and no delay will occur. Under the circumstances we request that all information, regardless of its nature, be handled through San Francisco, with the three copies of each letter as you have suggested, so that our branches will have on file the complete story, the same as we have here.

With kindest personal regards from the writer to all members of the Fenwal organization, we remain

Yours very truly,

MONTGOMERY BROTHERS,

/s/ F. H. MONTGOMERY.

FHM:da

[Endorsed]: Filed July 13, 1950.

(Testimony of W. Ray Montgomery.)

Q. (By Mr. Doyle): Now, directing your attention to the second sentence of your letter to Robinson in response to his report, [276] and particularly to this language: "We like constructive criticism and by working together we are satisfied that profitable results will manifest themselves in the not too distant future." Does that refresh your recollection as to whether there was any criticism of your handling of this account?

A. There was no criticism; there were suggestions offered as to what they thought they might do or we might do to increase business—no criticism whatsoever.

Q. You distinguish between suggestions for improvement and criticism of the situation as it existed?

A. Absolutely; the meaning is altogether different.

Q. You were not, however, unaware that they were making constant suggestions for better representation?

A. That was the only suggestion they ever made, to my knowledge.

Q. I show you, Mr. Montgomery, a copy of a letter addressed to Montgomery Brothers from C. J. Robinson dated June 4, 1948, to the personal attention of W. Ray Montgomery, and ask you if that was received in the usual course of business?

A. Yes, sir, that letter was received.

Mr. Doyle: I request that it be marked Plaintiff's Exhibit next in order.

(Testimony of W. Ray Montgomery.)

The Clerk: Plaintiff's Exhibit 38 in evidence.

(Letter dated June 4, 1948, Fenwal to Montgomery, was marked Plaintiff's Exhibit 38 in evidence.)

PLAINTIFF'S EXHIBIT No. 38

(Copy)

Air Mail

Special Delivery

June 4, 1948

Montgomery Brothers—Portland

Mr. C. J. Robinson

Compensation for Aircraft Business

Personal

Attention: Mr. W. Ray Montgomery

This will confirm our telephone conversation the other day relative to your proposal regarding increased compensation on aircraft business on the West Coast.

It is my understanding that we were to quote you a net price on any special aircraft Thermoswitch. You were to take this price, review it with what you felt the traffic would bear on the particular application, and add to this price this proportionate amount. This would establish the price for this Thermoswitch, and you agreed to split the difference with us in order that we could all make more money on aircraft business.

I have discussed this matter with my associates

(Testimony of W. Ray Montgomery.)

and it is our decision that we cannot permit this action on your part for the following reasons. First, because we, as a manufacturer, must control the pricing of our Thermoswitches. Second, if you were allowed to proceed with this policy, the price established would then be the price over the entire country. This, of course, cannot be, since some aircraft companies would demand a lower price. Third, the control of such a program is practically impossible.

We will therefore continue to operate as we have in the past. We will establish the net prices on the Thermoswitches and you will receive your commission as previously agreed upon. We would appreciate your advising us, however, if you feel that any of the prices on existing Thermoswitches or any new Thermoswitches are too low. We will review the prices already established after we receive your comments.

It is our opinion that with the increased purchases which will take place in the aircraft industry, you will be adequately compensated, providing maximum effort is expended. I will reiterate my thinking regarding this effort as previously discussed during your recent visit. It is my opinion that the aircraft companies are not being adequately covered and that time is not properly allocated to give the correct amount of coverage.

After reviewing the new aircraft program efforts now set up, it would be my opinion that you should

(Testimony of W. Ray Montgomery.)

take steps to add at least a man, or two good men, to your staff in order to give proper coverage.

C. J. ROBINSON,
Sales Manager.

CJR:dd

[Endorsed]: Filed July 13, 1950.

Q. Directing your attention particularly to the second paragraph [277] reading:

“It is my understanding that we were to quote you a net price on any special aircraft thermo-switch. You were to take this price, review it with what you thought the traffic would bear on the particular application, and add to this price this proportionate amount. This would establish the price for this thermoswitch, and you agreed to split the difference with us in order that we could all make more money on aircraft business.

“I have discussed this matter with my associates and it is our decision that we cannot permit this action on your part for the following reasons.”

And then at the bottom of the page:

“It is my opinion that the aircraft companies are not being adequately covered and that time is not properly allocated to give the correct amount of coverage.”

Does that refresh your recollection on whether there was any criticism of the handling of the account?

A. No, sir.

(Testimony of W. Ray Montgomery.)

Q. There still wasn't? A. No.

Q. And, finally, Mr. Montgomery, I show you a copy of a communication to Montgomery Brothers from C. J. Robinson dated December 9, 1948, and ask you whether that was received in the usual course of business.

The Court: You can read it later. You know whether you got [278] the letter.

A. Yes, we got the letter.

Mr. Doyle: Very well. I request that that be marked Plaintiff's next in order, offered in evidence.

The Clerk: Plaintiff's Exhibit 39.

(Letter dated December 9, 1948, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 39.)

PLAINTIFF'S EXHIBIT No. 39

December 9, 1948

Montgomery Brothers, San Francisco

Mr. C. J. Robinson

Your Order 12356

Our Order X46477

Attention: Mr. F. H. Montgomery

Dear Fred:

Many times you write us regarding certain problems which confront you in the field which promise business and ask us to turn handsprings to give

(Testimony of W. Ray Montgomery.)

you answers. Oftentimes after having done exactly that, and having received the business, certain questions arise wherein we need information from you, and I must say that as of late, certain items have not been given the attention we feel they should have been given, nor have we had the courtesy of replies.

I refer specifically to the subject order covered in my letter of November 16. This order has been open since July 23. We do not feel that it can be ignored. We would like the courtesy of an answer. It certainly would seem to us that if this were properly handled, it merely requires some of you walking into the Purchasing Office at Boeing, laying the cards on the table and getting a definite statement from them as to what they intend to do about the matter.

I want to thank you for your letter of December 6, giving us a disposition of the balance of the Thermoswitches for Boeing on your order 11916. Before we received this disposition, however, it was necessary that I write you, that Dana Hill write you and finally that the matter be taken up with you by our Controller. This certainly should not be necessary. I think you will realize that when other people have to begin to take action in such matters, Montgomery Brothers are certainly being given many a black eye.

Possibly you feel that these matters are not your responsibility. We definitely believe that they are. Won't you please spend one day, or one week if it

(Testimony of W. Ray Montgomery.)

is necessary, to bring the subject order and any other such matters to a reasonable conclusion?

Very truly yours,

FENWAL INCORPORATED,

/s/ C. J. ROBINSON.

CJR:dd

cc: Mr. AC Drew

[Endorsed]: Filed July 13, 1950.

Mr. Doyle: That is all.

The Court: If you want to review your notes, we will take ten minutes here.

(Recess.)

Redirect Examination

By Mr. Christin:

Q. Mr. Montgomery, you were asked about the work that you had done to develop the thermostat, the model of which you have in your hand, and comparing it to the thermostat in Exhibit No. 35. I will ask you when and where and under what circumstances was the model you have in your hands developed?

A. This thermostat was a development of the Fenwal Company after the meeting in Kansas City at the T. W. A. Office.

Q. Who was there?

(Testimony of W. Ray Montgomery.)

A. Of the Fenwal Engineers, Mr. Poitras, Mr. Ryan, and myself, and a Chief Power Plant Engineer of the Lockheed Manufacturing Company. And it differed primarily in one respect from the switch that we had developed—that is, when I say “we,” I mean [279] myself and the Lockheed engineers. That difference is the difference that this switch in the mechanism that actuates the contact or in the temperature that contact is made, it is hermetically sealed, and we had no way of doing that with a standard switch except by modification, and the switch that we developed differed from the switch that they refer to in there, in their exhibit No. 35, inasmuch as the switch that they show there is this switch here, which is their standard switch as shown in the standard catalog, that they have used for quite some time, shown on the face of the cover of the catalog.

The reason that that switch was not satisfactory and could not have been used in aircraft is because in aircraft a fire detector switch is used at different parts of the aircraft, the greatest number being used in the engines themselves which are on the wing, or a part of the wing, where vibration is very, very high, and this switch as such, you make the calibration of the switch changeable by merely changing the calibration screw on the outside, and in its use in aircraft it would immediately become loose and you would not have any setting whatsoever.

(Testimony of W. Ray Montgomery.)

The next thing, in this particular switch we had to have some mounting whereby the loom that the wires come to the switch would be on a grounded circuit rather than to have a two-wire circuit like we have here, so that you could check the continuity of the switches as far as wiring was concerned while the plane [280] was on the ground or in flight, and at the same time you could tell if there was a break in the line by having the switch grounded, at what particular part the break might be.

At the time we developed the first switches for Lockheed, Fenwal wasn't making a fire detector switch as such. They gave us their standard catalog. So from the standard catalog we picked the switch that would be best applicable to the use that we intended to put it to.

Since the barrel of the switch wanted to be in the part of the airplane that would be subjected to fires, and the wiring preferably should be back at the fire wall, we used a flange sealed switch.

We offered to Fenwal to make that a grounded one-wire switch instead of a two-wire as in their standard.

The next thing we had to do was to put one of their standard locking devices on the adjustment screw so that the vibration would have no effect upon the change of the temperature setting of the switch.

The third thing that we put was a tamper-proof cap which we sealed so that anyone servicing the aircraft would not change the setting. That is why

(Testimony of W. Ray Montgomery.)

it differs from that particular switch that they used at the beginning of the entire proposition. And in putting our tamper-proof switch we made our pictures of it for Kansas City, we did everything we could short of hermetically sealing the switch, by using cascades of metal and pulling [281] them down as tight as possible.

Q. You were in constant touch with the Engineering Departments of the aircraft manufacturers and at the same time in touch with the Engineering Department of Fenwal?

A. We had to work as a liaison in between both of them.

Q. So far as engineering, Hawkins assisted you in that work? A. Yes, sir.

Q. And if you weren't there, he carried it on himself? A. Yes.

Q. Did Robinson and Turrene come out here often to see you?

A. They were out here on several occasions.

Q. And what assistance did they give you, if any, in getting business?

A. They gave us very little assistance, other than the fact that they would go with us to the aircraft companies and listen to us present the problem to the engineers that we talked to.

Q. Now, when you left San Francisco on the 26th, or after the last session in San Francisco on the 25th, and you were going to Los Angeles, as you understood it from what you had been talking about

(Testimony of W. Ray Montgomery.)

with Mr. Storkerson, had a definite agreement been reached? A. No, sir.

Q. And when you left Los Angeles after the conference of the 28th had in your opinion a definite agreement been reached? A. No, sir. [282]

Q. Was he to go back to the home office, confer and let you know?

A. That is right, and offer the tentative plan that we had proposed.

Q. These letters—calling your attention to Exhibit 31 shown you by counsel, August 26, 1947, from Mr. Robinson, the Sales Manager, and ask you when you received that letter requesting more sales, did you at that time understand it to be a criticism?

A. I did not.

Q. What did that mean to you?

A. This is purely and simply, from my standpoint, a letter that he has written to stimulate sales, offering suggestions where he thought we might better the service we could give them, and it is a typical Sales Manager's letter to stimulate his sales.

Q. And you regarded that as a constructive criticism, is that correct? A. Yes, sir.

Q. And did you after that attempt to carry out the suggestions of Mr. Robinson? A. Yes, sir.

Q. With reference to the letter of June 4, 1948, counsel read you but one part of it, the last paragraph.

Mr. Doyle: I didn't read it to him; he read it to me.

(Testimony of W. Ray Montgomery.)

Mr. Christin: Pardon me; it was read [283] by somebody.

Q. In reading the entire letter from the Sales Manager in its entirety, would you say that that, in your opinion as a Sales Manager yourself, was a criticism? A. No, sir.

Q. What did that mean to you, the entire letter?

A. Exactly the same thing. That is a letter written addressed to me to get me to increase our sales for him.

Q. And in that particular year the sales were as high as any year you ever had, is that correct?

A. Yes, sir.

Q. I call your attention to Exhibit 39, and this was written December 9, 1948, a very short time before the letter of cancellation——

A. Yes, sir.

Q. And when you received that letter and before the termination notice, what did you do, if anything? If that was a criticism did you do anything to correct it?

A. I think that we gave him the answer that he asked for.

Q. What was that?

A. We must have written him a letter in reply to this giving him the information he wanted.

Q. Have we that letter here?

A. I don't know whether it is in the file or not.

Mr. Christin: We will produce it. Now, may it please the Court and Counsel, I haven't attempted to segregate the trial. [284] I haven't gone into the element of damages on the cross-complaint, and I

(Testimony of W. Ray Montgomery.)

think it better not to go into that, maybe, until later, because that is more of an affirmative case. With that——

Mr. Doyle: I would suggest, in view of Your Honor's ruling—I understood from what Your Honor stated yesterday that there was no point in my making an argument on my motion to dismiss the cross-complaint as insufficient to state a claim. Your Honor indicated that he wanted to hear the evidence and then rule. I accordingly have not made the motion, and do not propose to do it at this time. I understand Mr. Christin is about to open his affirmative case on the cross-complaint.

The Court: Let me hear what he was going to say. He hadn't finished.

Mr. Doyle: Pardon me; I thought he had.

Mr. Christin: I was just saying that I would excuse Mr. Montgomery now and then continue with Mr. Fred Montgomery and then refer to the deposition of Mr. Hawkins, and then start my proof on the affirmative matter and damages.

The Court: All right. Step down.

Any further questions?

Mr. Doyle: I have no further questions, and I assume that you are through with this witness except on the damages.

Mr. Christin: Mr. Fred Montgomery.

FRED H. MONTGOMERY

called for plaintiffs, sworn. [285]

The Clerk: Will you state your name to the Court, please.

A. Fred H. Montgomery.

Direct Examination

By Mr. Christin:

Q. Mr. Montgomery, are you one of the partners in this business? A. Yes, sir.

Q. And as such, do you partners segregate your duties? Does one take care of one branch and one the other?

A. My brother Ray takes care mostly of the outside connections, and I take care of the administrative and office end principally.

Q. Was that way ever since 1944?

A. Yes, sir.

Q. And that way today? A. Yes, sir.

Q. Were you present at a conversation in your office on January 24th and 25th which was attended by Mr. Storkerson and your brother?

A. Yes, sir.

Q. Will you tell us that conversation as you recall it?

A. My brother Ray and I were in my office, and Mr. Storkerson came in. And after the usual greetings, my brother Ray said to Mr. Storkerson, "What is this cancellation all about?"

And Mr. Storkerson said, "I will give you a letter

(Testimony of Fred H. Montgomery.)

that I have brought out with me, which is signed by Mr. Walter. You will read the letter." And he gave the letter to me, and I read [286] it, and then my brother Ray said that there must be another reason other than stated in Mr. Walter's letter.

And Mr. Storkerson said, "I didn't come here to argue any points at all; I came here to effect the termination of the contract."

And my brother Ray said, "You know that that isn't the reason; and if you don't care to tell me the reason, I shall tell you the reason, and the reason is that you are going to open your own office in Los Angeles and our former employee is going to operate that office, without that combination it would be impossible for you to take—to enter into the business in Los Angeles."

And we discussed several things along that line.

We went to lunch. Ray and I discussed the proposition, and we decided at that time, Ray and myself, and we so stated to Mr. Storkerson——

Q. You can't state what you decided; just the conversation.

A. The conversation when Mr. Storkerson came back was that in substance, that we would be willing to carry on as we had heretofore, providing that they would exclude the Southern California territory which their office would take care of and we would continue in the rest of the territory as we had heretofore.

Mr. Storkerson said that he did not care to discuss that, he wanted to discuss the issue that he came out

(Testimony of Fred H. Montgomery.)

here to discuss, and he said there would be a subsequent matter that should be [287] taken up later.

And we told Mr. Storkerson—I told Mr. Storkerson that we would only discuss the matter in relation to a continuation of the contract, and if that wasn't acceptable, why, then, we would continue to, as we had heretofore, get all the orders that we possibly could, would carry on as we had been, and that we would expect all of the profit on the sales that we would turn in to Fenwal up to and including the last day of the month, the last of February.

And so Mr. Storkerson said "What is your proposition?"

And we stated that if that could be worked out, why, we would be willing to forego 50 per cent of our profit upon the orders in Southern California to the aircraft industry that had not been shipped prior to the termination of the contract.

And Mr. Storkerson said, "I have no authority whatsoever to make any commitment; it will have to be done in Ashland. However, I will be glad to make a recommendation, and that up to now, no recommendation that I have ever made has ever been turned down."

And we said, "Well, if we can proceed on that basis, what is the next move?"

Mr. Storkerson said, "I would like to have Ray meet me in Los Angeles and go to the aircraft industry, explain to them this transition, so that there will be no interruption in the termination of your contact and the beginning of our contact." [288]

(Testimony of Fred H. Montgomery.)

So with that my brother went to Los Angeles and met Mr. Storkerson.

Q. Did you see Storkerson again after that?

A. I saw him once after that in early March.

Q. In San Francisco?

A. In San Francisco. Mr. Storkerson came into my office.

Q. That is all right; you didn't see him between the time that he went to Los Angeles and the time he came back some time in March?

A. No, sir.

Q. In the beginning of your transactions with Fenwal you were the one who took care of the payment of invoices, were you not?

A. That is correct.

Q. In the firm? A. That is correct.

Q. For some period of time what was the general way of paying your bills, starting with '42 and up to a certain time?

A. We would pay all bills, including Fenwal's, on the 10th of each month for everything purchased in the preceding month.

Q. Did anything occur about 1947? Was Fenwal sending their statements on time?

A. There was a period for several months there that we got no statements at all, and we would have to pay from their invoices. They would send us an invoice with each shipment, and the end of the month came around and we couldn't tell whether or [289] not we had received all of the invoices in that calendar month. And I requested a state-

(Testimony of Fred H. Montgomery.)

ment each month so that we could reconcile the invoices with the statement before we send our check. That would eliminate errors, and if there was any mistake, we could catch it before we made our remittance. And there were several letters that passed between our Accounting Department and Fenwal requesting these statements.

Q. To correct that lapse of receiving statements, you did write a letter on May 20, 1947, Plaintiff's Exhibit 15, is that correct? (Showing.)

A. That letter was written by our Accounting Department.

Q. One of your letters? A. Yes.

Q. I read from Paragraph 5:

"We religiously pay all our accounts on the 10th of the month. If we could get your invoices rendered correctly with the correct discount, and also if we could get a statement from you each month by the 10th of the month, we would have your check in the mail every month on the night of the 10th. For instance, the last statement we received from you was for January, February and March. This was not sent until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statement each month."

After that were the statements sent to you each month by Fenwal? [290]

(Testimony of Fred H. Montgomery.)

A. I presume they were.

Q. Then, thereafter, as in the case of any of your other customers, you paid them on the 10th of the month, is that right?

A. Ever since we have been in business.

Q. Other than that letter, do you know of any agreement or anything in writing, so far as you know other than these letters, as far as you know, which changed the original contract which said nothing about the date of payment?

Mr. Doyle: If that is not a leading question on direct examination, Your Honor, "changed the original contract." Of course I will stipulate that the contract says nothing at all about time of payment.

Mr. Christin: That is all I want to know.

Mr. Doyle: Absolutely blank on that subject.

Mr. Christin: I will take that stipulation.

Mr. Doyle: He now interrogates the witness as to whether there were any writings which changed the original contract with respect to the time of payment.

Mr. Christin: I withdraw the question.

Mr. Doyle: I submit it is obviously a leading question.

Mr. Christin: Withdraw the question, if you will stipulate that there is nothing in the original contract as to the date of payment.

Mr. Doyle: The original contract speaks for itself. The [291] propriety of the question is nevertheless before the Court.

(Testimony of Fred H. Montgomery.)

Mr. Christin: I withdraw the question. That is all.

Mr. Doyle: No questions.

Mr. Christin: I will proceed with Mr. Hawkins' deposition at this time.

Mr. Doyle: I think you will have to. He isn't here.

The Court: I will read it.

Mr. Christin: Yes, Your Honor.

The Court: I can read it. Do you want to read it all?

Mr. Christin: No, I was just going to take parts of it, Your Honor.

Mr. Doyle: Of course, Your Honor, I didn't cross-examine. He was Mr. Christin's witness on the deposition. I didn't examine. Under the circumstances, I am perfectly willing to have any part of the deposition considered that is appropriate. I do make this observation: I objected to some parts of the conversation between Ray Montgomery and Hawkins at which no Fenwal person was present, as I did this morning in the course of the testimony.

I also pointed out that there were certain technical objections to Mr. Christin's right to take the deposition under the adverse witness provisions of the Federal Rules and under our Section 2055 of our local Code of Civil Procedure because he is not an officer, managing agent, and so on, of the corporate party; and not only that, but at the time of the occurrence of the matters [292] into which inquiry is made, he was in fact not an employee of Fenwal.

With these observations I have no objection to the Court reading all or any part of the deposition.

The Court: I will take it home and read it this evening. Put on your next witness.

Mr. Christin: Just one minute.

W. RAY MONTGOMERY

recalled on behalf of Plaintiffs, previously sworn.

Direct Examination

By Mr. Christin:

Q. When did Mr. Hawkins cease his employment with you?

A. The latter part of January, 1949.

Q. And he was no longer your employee at the 1st of February, 1949? A. No, sir.

Q. Did you see him in the employ—did you see him doing work, you yourself, for Fenwal in February? A. In February?

Q. Yes, sir. A. Yes, sir.

Q. Where did you see him and what was he doing?

A. In the office that they had rented in Los Angeles.

Q. And who was in that office at the time you saw him there?

A. He was getting it ready to open up by putting in partitions [293] and painting and things of that particular nature.

Q. At that time you were about to change your offices too in Los Angeles, were you not?

(Testimony of W. Ray Montgomery.)

A. Yes, sir.

Q. Did Mr. Hawkins, when he was working for you, suggest that you take the offices which later were rented to Fenwal?

A. He had me look at that office prior to the time that the Fenwal Company looked at it.

Q. And then you didn't take those premises?

A. No, sir.

Q. And they were taken by Fenwal.

A. That is right.

Q. And you moved also, didn't you?

A. Yes, sir.

Q. During Mr. Hawkins' employment with you had you had any difficulty with him at all—misunderstandings with Hawkins? A. No, sir.

Q. Did he ever complain to you that he was not getting the proper assistance from you in his work? A. No, sir.

Q. He asked for increases in salary once in a while? A. Yes, sir.

Q. And those were usually granted?

A. Yes, sir.

Q. Before you received the letter of resignation did he advise [294] you he was going to quit?

A. No, sir.

Q. Did he, so far as you know, advise any member of your organization that he was going to quit?

A. No, sir.

Q. And when he quit, did you go right down to Los Angeles?

(Testimony of W. Ray Montgomery.)

A. I went down on the—the first time after we received the termination notice of our contract, which was on the 31st day of December, 1948, I went to Los Angeles on Monday, or was in Los Angeles on Monday, January the 10th, for the first time.

Q. In substance, in your conversations, if you had same, with Hawkins did you in substance ask him to reconsider?

Mr. Doyle: Let's not lead; let's get to the conversation.

Q. (By Mr. Christin): All right. What conversation did you have with Mr. Hawkins?

A. I asked Mr. Hawkins what in the world he meant——

Mr. Doyle: Before we proceed with the conversation, I shall urge the same objection made this morning, that discussion between Mr. Montgomery and Mr. Hawkins in January of 1949, is not binding upon the plaintiff; it is hearsay as to this plaintiff.

The Court: I am going to reverse my ruling of a little while ago and admit it subject to objection. Go ahead with this line.

The Witness: I asked Mr. Hawkins—— [295]

Mr. Doyle: Further I should say—I beg your pardon, Mr. Montgomery—that Mr. Hawkins himself testified on this subject in his deposition.

The Witness: I asked Mr. Hawkins what in the world he meant by treating Fred and myself the way he did, and I called attention to the fact that

(Testimony of W. Ray Montgomery.)

in my opinion Fenwal without him could very—could hardly afford to open up an office in Los Angeles, since, he, himself, had all of the contacts with the major accounts that were using Fenwal products.

Then I asked him, “Edgar, when did you know that this was going to take place?”

“Well,” he said, “I knew that in September of 1948.”

And I said, “Why in the world didn’t you tell me at that time? You knew that I was going back to the factory in the Fall of the year, and I am quite sure I could have straightened this matter out had I have known of it.” He hung his head and told me that he guessed he should have done that.

I said, “Have Fred and I done anything that would deserve us—that we would deserve this type of treatment from you? Haven’t we always been fair with you? Why, then, wouldn’t you be fair with us and let us have an opportunity to keep this account by letting me talk to the principals before this action was taken.”

He said, “Ray, I had to make up my mind very quickly on this. I talked with Mr. Storkerson at length on the telephone” [296]—and I think that he talked with the office—“then I made up my decision that I was going to resign from Montgomery Brothers to take this position with Fenwal. It was my decision. I am going to have to live with it,

(Testimony of W. Ray Montgomery.)

and there is nothing that you can do or say that will change my opinion at this time."

Then I told Edgar, "Edgar, I am very, very disappointed. We have taken you from a young fellow; we have brought you up to a very valuable man to Montgomery Brothers. In my opinion we have given you a compensation above anything that you could get from anyone in the city of Los Angeles; but if you have made your decision, then I can only ask you to do one thing; to help us close all the business that we can prior to the expiration of our contract, which you know will be 60 days from the time that we received this notice on December 31, 1948." And he agreed to do that.

Q. (By Mr. Christin): Now, after you had a conference with him and Mr. Storkerson in Los Angeles—is that right? A. That's right.

Q. What were Mr. Hawkins' actual duties in Los Angeles? What did he do there?

A. He was the manager of the office, checked the work of the other employees, checked the sales, checked the paper work, that came from Los Angeles to San Francisco, and specialized in the sale of Fenwal and the Automatic Pump & Softener account.

Q. Did he have anything to do with [297] Weigand?

A. He sold Weigand but not specializing in that particular proposition.

Q. Did he, as office manager, have access to all

(Testimony of W. Ray Montgomery.)

the books, records and files of business done by Montgomery Brothers in the Los Angeles area?

A. Yes, sir.

Q. What were the nature of those documents to which he had access? What did he do down there?

A. All the orders that we had received, all the acknowledgments that he has sent up to us on sales—for we bill upon the acknowledgement of the shipment of an order to our customers, the billing being done in San Francisco, and copies of our invoices sent to the office that has sent in the acknowledgment. He also forwards to San Francisco all requisitions for material that we do not have in stock, but that will have to be ordered from the factories and subsequently shipped from them.

Q. Was there any other employee in the Los Angeles area in the month of January, 1949, who could carry on his activities? A. No, sir.

Q. Was there anyone in any one of your other branches that could carry on the Los Angeles business in January, 1949?

A. I should answer that “No, sir,” because they would not have the contacts or know the city or know the customers like Mr. Hawkins did.

Q. Who contacted those airplane customers in Los Angeles during the Fenwal sales agreement other than you and Mr. Hawkins? [298]

A. No one from our office in Los Angeles.

Q. Would you send people from the northern office or from San Francisco to contact the Los Angeles trade? A. Would we send—

(Testimony of W. Ray Montgomery.)

Q. Would you send the man from Boeing, Reed, to Los Angeles at any time? A. No, sir.

Q. Or would you send Conant from San Francisco down there?

A. No, sir, not to contact the aircraft factories.

Q. When you knew that he was going to leave and he wouldn't change his mind, what did you do with reference to adjusting your situation in Los Angeles?

A. I had to cast about to find a man that could come into our office to assume the duties that he had had after we had had an opportunity to break him into that type of work. You must remember that it had taken us quite some time to get Mr. Hawkins from the point that we received him in Los Angeles as a cub or as a clerk up to the point of him being manager.

Q. Did you know any man at that time in January, 1949, who was at that time qualified to carry on those activities of Hawkins?

A. I did not.

Q. How long did you have to stay in Los Angeles to straighten this situation out?

A. I was there off and on most of the time. [299]

Q. For how long?

A. A matter of some six months.

Q. In casting about did you find another individual to employ?

A. I employed two individuals, one Mr. Ralph O. Dodge, who had been working for the Douglas

(Testimony of W. Ray Montgomery.)

Corporation—Douglas Aircraft Corporation, and another, Mr. Ray Gray. [299-A]

Q. Had Mr. Dodge ever been Manager or General Manager or Assistant Local Manager for any firm such as Montgomery Brothers, so far as you know? A. Not to my knowledge, no, sir.

Mr. Doyle: Pardon me. May it please the Court I object to this line of interrogation upon the ground that since the contract was terminated upon 60 days notice, it was unnecessary any longer to sell Fenwal products to the aircraft industry; Mr. Montgomery did not need any men for that job after the effective date of termination of the Fenwal agreement, so that whether they employed somebody else to do the work that was no longer do-able under the contract is neither an item going to the existence of the cause of action nor to the damage feature upon which they claim.

The Court: He has answered. The answer may stand subject to the objection.

Q. (By Mr. Christin): Did Hawkins do anything else other than contact Fenwal customers?

A. Well, I should say he did.

Q. Was he the office manager?

A. Yes, sir.

Q. And he also met the trade and handled these other sales to the other parties?

A. He specialized in the Automotive Pump and Softener Company's account. [300]

Q. The man that you were casting about to get was a man, I take it, who would be able to carry

(Testimony of W. Ray Montgomery.)

on the activities of Hawkins regardless of the sales to the Airplane companies? A. Absolutely.

Q. You at that time knew that your airplane business would cease? A. That is right.

Q. On March 1, is that right?

A. That is right.

Q. Unless some agreement was reached with Fenwal in the interim; is that correct?

A. That is right.

Q. This man Dodge that you got, so far as you know, you said he had never had a managerial position before, is that correct?

A. Not to the best of my knowledge.

Q. What was his line of activity with the aircraft people from whom you got him?

A. He was an engineer in the heating and ventilating division of the Engineering Department at the Douglas Aircraft Company. He headed up that department.

Q. He headed up that department?

A. That is right.

Q. And then you brought him to Montgomery Brothers? A. That is right.

Q. The other fellow—what was his name? [301]

A. Mr. Gray.

Q. Who was he?

A. He was a man that I employed to do the clerical work and handle this work that Mr. Hawkins had been overseeing.

Q. And so far as you know, had he ever had the managerial duties of an office manager?

(Testimony of W. Ray Montgomery.)

A. No, sir.

Q. With these two men you spent a considerable period of time, is that right?

A. That is right.

Q. How long would you say it took you to get that office in Los Angeles running on an even keel?

A. I could answer that by saying it isn't on an even keel at the present time.

Q. Well, have you done all you possibly can do to get it to run on an even keel?

A. It takes quite a time, Mr. Christin, for us to break in a man. In a small office a man must be versatile; he must be able to handle all the things that we do; he must specialize in certain lines and he must have the ability to manage other people if he is going to be the Manager, and that takes time for him to gain the necessary experience to do that type of a job.

Q. In this transition from Hawkins to the new personnel, did your suffer a diminution of business exclusive of the aircraft business during that period of time? [302]

A. Yes, sir.

Q. Are you able to tell us how much?

A. I read the—I gave the difference in the amount of the business. The Los Angeles office in 1948, the total Los Angeles sales of all the things Montgomery Brothers sold, \$474,479.11; in 1949 was \$300,940.27; a reduction in the total amount of business that we did in the office of some 17,000—no, \$170,000.00.

(Testimony of W. Ray Montgomery.)

Q. Do you know how much of that was the airplane business?

A. How much of that was the airplane business?

Q. Yes.

A. At that time, the total amount of profit that we could have made, I don't have it broken down from the standpoint of Los Angeles, but I have——

Q. Can you get it by the morning?

A. Yes.

Q. How much of that was airplane?

A. Yes, sir.

Mr. Doyle: I would suggest in that connection, if Your Honor please, that for the purposes of interrogation on cross-examination of this witness that they produce for 1949, 1948 and back through 1942 their copies of the partnership federal income tax returns——

Mr. Christin: If Your Honor please——

Mr. Doyle: So we can interrogate the witness with respect [303] to the partnership earnings over these periods.

Mr. Christin: Our books are entirely open to you for any kind of accountant you want to put on them.

Mr. Doyle: That would include the partnership returns?

Mr. Christin: Just a minute, we are very substantial merchants in this community and we have competitors, and we may be competitors of these people, and I do not think—I call upon the Court's discretion to not have us produce income tax returns at this time. The books are open to you to

(Testimony of W. Ray Montgomery.)

put your accountant over there, anything you want, but I don't think that it is proper to go and get a man's income tax on one branch of the case just for satisfying curiosity. The same information is available to you in our books. They are presumed to be correct. If they are not, we will stand corrected.

Mr. Doyle: I have absolutely no interest in the returns of these gentlemen individually or the figures they show. What I am interested in is the partnership returns if there is to be interrogation about partnership income and expense.

Mr. Christin: I don't see the materiality.

Mr. Doyle: I suppose these gentlemen split their income 50-50; I don't know what they do.

Mr. Christin: What is that?

Mr. Doyle: That is up to them, but the partnership return shows the income and expenses.

Mr. Christin: Our books show it completely. I don't think [304] it is proper in a case to make divulgement of the income tax returns which are at least quasi confidential. We have no objection to showing the Court; we will give the Court the income tax returns and he may check them. I don't like to have it divulged in a public record of two merchants of this city, and have them blasted forth to the general public. I will answer the Court's discretion. If you want to see them, if it is material, the Court may look at them.

The Court: Go ahead with your examination. We are not up to that yet.

(Testimony of W. Ray Montgomery.)

Mr. Christin: I wanted to do this to save time. Anything you want brought here in the morning, tell me now, and I will have it here.

The Court: He says he wants the income tax returns. That is all he said he wanted.

Mr. Christin: No, no, he wanted something else.

The Court: No, he did not.

Mr. Christin: All right; he isn't going to get them at the present.

Q. What did you pay these men, do you know? Dodge?

A. I gave Mr. Dodge a salary of \$400.00 per month, and in 1949 we paid a bonus of \$4,000.00. We paid Mr. Ray Gray an average salary because he got a raise, of \$200.00 per month, and paid him a bonus of \$700.00 during the year of 1949.

Q. Did the fact that Hawkins was no longer there cause any [305] criticism as far as you understand of your general reputation, that he had been taken away from you?

A. Cause any criticism?

Q. Yes, that you had lost this valuable man?

A. Well, I have had people tell me that I must have had a hard time replacing Mr. Hawkins, but I don't think I have had any criticism.

Q. Put it this way: In your opinion, as you see it now, have Hawkins' activities with your company been fully substituted for by the activities of these two men you have——

A. No.

Mr. Doyle: Now, we are asking the witness for his opinion as to whether the people think about the

(Testimony of W. Ray Montgomery.)

subject. I submit the question is objectionable and I object to it on the ground that it calls for a conclusion of the witness.

The Court: It is admitted on the subject of punitive damages. Do you have punitive damages in California?

Mr. Christin: Yes, we have.

The Court: You are living in a very modern State. You ought to pick up that.

Mr. Christin: The only thing we do not have in California are hop barrel cases.

The Court: The objection is overruled.

The Witness: Will you repeat the question?

Mr. Christin: Will you please read the [306] question?

(The reporter read the question.)

The Witness: I still don't understand the question.

Q. (By Mr. Christin): Put it this way: Have the activities of the two men who are there now in the present training and condition in the business entirely substituted the services which were being rendered by Mr. Hawkins while he was there?

A. No, sir.

Mr. Christin: If Your Honor please, we will have to come back tomorrow morning anyway, and I have to see some people who are leaving for Europe.

The Court: You are about through?

Mr. Christin: Just about through.

The Court: Suppose you finish with him, and if

(Testimony of W. Ray Montgomery.)

you have something else I will let you open it up.

Mr. Christin: All right.

The Court: I would like you to go home and feel you left the doors open.

Mr. Christin: I beg your pardon?

The Court: Go ahead.

Mr. Christin: I didn't quite get that.

Q. Are you able to tell us now the actual money damages in a lump sum that you sustained actually?

Mr. Doyle: Now he is asking the witness a question which is addressed to the Court.

Mr. Christin: Very well. That is what I want to know. [307]

Q. Have you done all you can from your standpoint in your capacity in that business to alleviate the situation which existed by reason of Hawkins quitting? A. Yes, sir.

Mr. Christin: That is all for the present.

The Court: This will be your last witness, won't it?

Mr. Christin: Yes, Your Honor.

The Court: Do you expect to have rebuttal?

Mr. Doyle: I don't believe so, Your Honor.

The Court: You gentlemen probably will then be ready to argue the case tomorrow.

Mr. Doyle: I shall be ready to argue it tomorrow morning.

The Court: We will adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Friday, July 14, 1950.) [308]

Friday, July 14, 1950, 10 o'Clock A.M.

The Clerk: Fenwal Incorporated versus Montgomery Brothers on trial.

W. RAY MONTGOMERY

recalled, having been previously sworn.

Direct Examination

(Continued)

By Mr. Christin:

Q. You were to bring some figures that Mr. Doyle asked you for. Have you those figures here?

A. Yes, sir.

Q. Mr. Doyle wanted to know some figures.

A. Do you want me to give Mr. Doyle those figures?

Mr. Christin: Yes.

Mr. Doyle: Proceed with your examination, Mr. Christin.

Q. (By Mr. Christin): Mr. Montgomery, have you in mind the amount of damages to your business by reason of the interference in having Mr. Hawkins taken away from you?

A. Yes, sir.

Q. What is that amount?

A. \$50,000.00

Mr. Christin: That is all.

Cross-Examination

By Mr. Doyle:

Q. When you stated yesterday, Mr. Montgomery, that Mr. Hawkins had access to all the books, records and files of Montgomery Brothers, did you

(Testimony of W. Ray Montgomery.)

mean that he had access to your general books and so on?

A. He had access to all the files pertaining to the business of [309] the Los Angeles office in Los Angeles.

Q. Not to the San Francisco office?

A. No, sir. He could come up any time for that. We have never refused him. He had never asked for it.

Q. The files that he had access to were those in the Los Angeles office?

A. The things that he had to do with, yes.

Q. Directing your attention to the provision of the contract of May, 1946, which is in evidence here as Plaintiff's exhibit 1 and to Paragraph 8 thereof and to the last sentence of Paragraph 8:

"At the termination of this contract, Montgomery agrees to return to Fenwal all samples, papers, price lists or belongings of Fenwal which may be in the possession of Montgomery at the time and an active list of purchasers of switches."

Do you know whether an active list of purchasers of switches was given to Fenwal upon the termination of this contract?

A. It was never asked for.

Q. When you saw Mr. Hawkins in Los Angeles early in January, 1949, did you discuss with him the relatively poor position of Fenwal and the relatively good position financially of Montgomery Brothers?

A. Yes, sir.

(Testimony of W. Ray Montgomery.)

Mr. Doyle: That is all.

The Witness: Did you want these figures? [310]

Mr. Doyle: No, thank you.

The Witness: Thank you.

Redirect Examination

By Mr. Christin:

Q. Just a moment. I will put those figures in evidence.

Q. Have you a breakdown there of the amount of business which was done in the Los Angeles office in the year 1948?

A. The amount of business that was done in Los Angeles?

Q. Yes.

A. I gave that yesterday. I don't happen to have it here.

Q. Have you the amount of Fenwal business that was done in Los Angeles in '48.

A. No, sir, I haven't it with me.

Q. What figures did you bring?

A. I brought the figures of the total amount of business for 1948 of Montgomery Brothers.

Q. What was that?

A. And the percentage of the business of the total that was Fenwal business.

Q. What is the total amount?

A. \$1,308,081.78.

Q. What proportion of that was Fenwal?

A. Approximately 40 per cent.

(Testimony of W. Ray Montgomery.)

Q. What was the business in 1949?

A. \$813,772.36. [311]

Q. What percentage of that was Fenwal?

A. Approximately 12 per cent.

Q. Have you got the figure there?

A. Yes, sir.

Q. What is it?

A. The actual figure is \$68,421.78. The actual figure of the first—of the 1948 business was \$346,920.44.

Mr. Christin: That is all.

Recross-Examination

By Mr. Doyle:

Q. Would you say, Mr. Montgomery, that most of the reduction in the figure in 1949 was on account of the termination of the Fenwal contract?

A. Yes, sir.

Mr. Doyle: That is all.

Q. (By Mr. Christin): While you were organizing this new setup in Los Angeles did you lose other business also? A. Yes.

Mr. Christin: That is all.

That is all, Your Honor.

We offer in evidence Plaintiff's interrogatories which were submitted and answered by Dr. Walter in evidence. They are on file.

Mr. Doyle: No objection.

The Court: Admitted.

Mr. Doyle: Plaintiff rests.

Mr. Christin: Defendants and cross-complainants rest. [312]

The Clerk: Defendant's Exhibit D.

(The interrogatories and answers of Dr. Walter referred to, were marked Defendant's Exhibit D in evidence.) [313]

DEFENDANT'S EXHIBIT D

[Defendant's Exhibit D is identical to Interrogatories Directed to C. W. Walter and Answers to Interrogatories. See pages 68 to 71 of this printed record.] [313-A]

* * *

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 407 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed December 7, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint for Breach of Contract.

Motion for More Definite Statement.

Notice of Motion for More Definite Statement.

Answer and Cross-Complaint.

Contains Exhibit A and Exhibit B.

Demand for Trial by Jury.

Answer to Cross-Complaint.

Request for Interrogatories, Directed to C. M. Walter.

Request for Interrogatories, Directed to J. M. Storkerson, General Manager, of Fenwal, Incorporated.

Answers of J. M. Storkerson to Interrogatories and Certain Attached Papers.

Answers of C. W. Walter to Interrogatories.
Stipulation.

Memorandum Re Proposed Judgment.

Memorandum of Decision.

Findings of Fact and Conclusions of Law.
Judgment.

Notice of Entry of Judgment.

Notice of Appeal by Plaintiff.

Notice of Appeal by Defendants.

Designation of Record on Appeal of Appellant
Fenwal, Incorporated.

Designation of Record on Appeal of Cross-Appellants, W. R. Montgomery and Frederick H. Montgomery, doing business under the firm name and style of Montgomery Brothers.

Order Extending Time to File Record on Appeal and to Docket Appeal in Circuit Court.

Deposition of Edgar V. Hawkins—Not filed—in the Folder of this case.

Reporter's Transcript on Appeal for July 11, 12, 13, 1950.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39.

Defendants' Exhibits Nos. A, B and C.

Order Extending Time to File Record on Appeal, etc., to December 29, 1950.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of December, A.D. 1950.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12777. United States Court of Appeals for the Ninth Circuit. Fenwal, Incorporated, a corporation, Appellant, vs. W. Ray Montgomery, Frederick H. Montgomery and Montgomery Brothers, a partnership, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 20, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12777

FENWAL, INCORPORATED, a Corporation,
Plaintff-Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY, and MONTGOMERY
BROTHERS, a Partnership,
Defendants-Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT FENWAL, INCORPORATED,
INTENDS TO RELY

The points upon which Plaintiff-Appellant, Fenwal, Incorporated, intends to rely on appeal are as follows:

1. The Court erred in making and entering its findings of fact set forth in Paragraph IV of the Findings of Fact and Conclusions of Law, which said paragraph reads as follows, to wit:

IV.

“That it is true that certain orders were placed by defendants with plaintiff prior to February 28, 1949. That said orders were accepted by plaintiff, filled and delivered by said plaintiff after February 28, 1949, which resulted in a financial benefit to said plaintiff in that plaintiff realized a profit on the articles so sold and delivered, and further benefitted

by the continuation of business between the plaintiff and the buyers thereof; that the services rendered by defendants in obtaining and filing of said orders with plaintiff were not gratuitously performed. That pursuant to the stipulation of the parties hereto filed July 14, 1950, the profits of defendants upon all orders obtained by the defendants and filled by the plaintiff would be \$36,525.20.

“That said sum of \$36,525.20 represents the profits which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of said contract and accepted by plaintiff. Shipments of said goods were made by plaintiff to defendants’ said customers under an assignment from defendants to plaintiff, which said assignment was made without waiving the rights of either defendants or plaintiff.”

for the reason that said findings are contrary to the evidence in that the evidence is to the effect that a portion only of the orders was accepted by plaintiff and the balance of said orders was rejected by plaintiff; that pursuant to stipulation of the parties, filed herein on July 14, 1950, the sum of \$17,361.46, and not the sum of \$36,525.20, represents the profit which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of the contract and accepted by plaintiff.

2. The Court erred in deciding that defendants are entitled to their profit on all orders accepted, on a quasi-contract basis—benefit to plaintiff.

3. The Court erred in concluding that defendants are entitled to an offset in the sum of \$36,525.20 against the amount plaintiff is entitled to recover from defendants, to wit, the sum of \$46,435.40, and in failing to conclude that the defendants were not entitled to any offset whatsoever.

4. The Court erred in rendering judgment in favor of plaintiff for the sum of \$10,110.20 with costs to neither party, and in failing to render judgment in favor of plaintiff for the sum of \$46,635.40 with interest and costs.

5. The Court erred in allowing defendants to offset profits in the sum of \$36,525.20 and in failing to consider that there should be deducted from said profits the cost to plaintiff of servicing the orders on which said profits were allowed.

Dated: San Francisco, California, January 2, 1951.

/s/ MORRIS M. DOYLE,

/s/ JOSEPH W. GROSSMAN,

McCutchen; Thomas, Matthew,
Griffiths & Greene.

Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 2, 1951.

No. 12,777

IN THE

United States
Court of Appeals

For the Ninth Circuit

FENWAL, INCORPORATED, a corporation,
tion,

Plaintiff-Appellant

VS.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a partnership,

Defendant-Appellees

Appellant's Opening Brief

MORRIS M. DOYLE

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FILED

MAY 4 1951

PAUL H. O'BRIEN

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No. 12,777

IN THE

United States
Court of Appeals

For the Ninth Circuit

FENWAL, INCORPORATED, a corporation,

Plaintiff-Appellant

VS.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a partnership,

Defendant-Appellees

Appellant's Opening Brief

STATEMENT OF JURISDICTION

This is an action to recover the purchase price of goods sold and delivered by plaintiff-appellant to defendants-appellees under a written contract. Appellant is a Massachusetts corporation authorized and qualified to do business in California. Appellees are citizens of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000 (Complaint, R. 3-11). The jurisdictional allegations of the complaint are not controverted (Answer, R. 12-20). The District Court had original jurisdiction of this action under 28 U.S.C., Section 1332.

This is an appeal from a judgment of the District Court sustaining appellant's claim but allowing substantial set-

offs asserted by appellees by way of counterclaim (R. 79). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291. The judgment of the District Court was entered on September 11, 1950 (R. 81) and pursuant to Rule 73, Federal Rules of Civil Procedure, notice of appeal was filed within thirty days thereafter, to-wit, on October 11, 1950 (R. 81).

STATEMENT OF THE CASE

Appellant, Fenwal, Incorporated, manufactures and sells thermostatic controls, so-called thermo-switches, which react to changes in temperature to break or make an electric circuit. These controls have been adapted to and have had considerable use as fire detectors in aircraft (R. 292). Appellees, Montgomery Brothers, do business as manufacturers' representatives. By an agreement dated May 26, 1944, Fenwal named Montgomery its exclusive representative for certain western states, Hawaii and Alaska (R. 5). Montgomery did not become Fenwal's agent. In accordance with a well established business practice the parties arranged for Montgomery to buy Fenwal's products at a discount from list prices and resell those products at a profit to Montgomery's customers. Thus the relation between Fenwal and Montgomery was that of seller and buyer and the contract expressly provided that this relationship and none other was contemplated by the arrangement (R. 8).

When an order for Fenwal switches was obtained by Montgomery, it would place the order with Fenwal (R. 307). Fenwal reviewed the order and if it was satisfactory sent a formal written acceptance to Montgomery (R. 88). Montgomery customarily directed that the goods purchased

by it be shipped directly to Montgomery's customer to whom the materials had been resold (R. 90). An individual invoice was sent by Fenwal to Montgomery for each shipment (R. 91), followed at the end of each month by a summary of the individual billings (R. 91). On or about the 10th of each month Montgomery paid Fenwal for all goods sold during the preceding month (R. 91). Since under this method of doing business Fenwal sold to Montgomery and Montgomery resold to its customers, the obligation to service the orders, that is, to arrange for changes to meet changed specifications, to negotiate in respect to rejections, etc., together with the credit risk, rested entirely with Montgomery. This was, of course, one element considered in fixing the discount rate.

The representation contract provided that it might be terminated by either party on 60 days' notice (R. 8). Fenwal sent notice of termination to Montgomery on December 29, 1948 (R. 96) and the contract was thereby terminated on February 28, 1949. Montgomery acknowledged effective termination of the contract, but asserted that Fenwal must accept all orders placed up to the effective date of termination regardless of when delivery was to be made (R. 99-100). Fenwal replied that this seemed unfair and not in accordance with the contract (R. 105). Thus a dispute developed as to the treatment of orders submitted by Montgomery to Fenwal during the 60 days prior to February 28, 1949, the termination date. The dispute involved orders of three kinds: (a) those accepted by Fenwal and on which Fenwal made delivery to Montgomery while the contract was still in effect; (b) those accepted by Fenwal but on which delivery was not to be made until after the representation contract terminated; and (c) those which Fenwal

did not accept. Orders in the first group, those received during the 60-day period and on which shipment was made during that period, presented no difficulty. They were handled in the ordinary course of business. The sales were completed to Montgomery and it resold to its customers at its customary profit. There was no dispute between the parties and there is no dispute here as to those orders. As to orders to be filled after the contract was terminated, Fenwal believed that such orders should be accepted and delivered only on an upward revision of the price to Montgomery. This was for the reason that the credit risk on such orders and the obligation to service them would rest not on Montgomery, as was customary and contemplated by the representation contract, but on Fenwal (R. 110). Montgomery insisted, however, on its regular price and regular profit (R. 108).

Conferences were held in an effort to resolve the dispute (R. 107-108). Montgomery's representatives introduced into these negotiations a suggestion that Montgomery receive a new appointment as manufacturer's representative for Fenwal products in a reduced area. In the latter part of February, 1949, Montgomery's proposals in that connection and in connection with the pending orders were under consideration by Fenwal (R. 132). Montgomery had not paid for shipments made under its orders by Fenwal during January and Fenwal made demand for the amounts owing (R. 145). Montgomery refused to make the January payment unless and until an arrangement satisfactory to Montgomery had been made in respect to pending orders and future representation (R. 172). Fenwal renewed its demand for payment advising Montgomery that no further shipments would be made unless the amounts due were

forthcoming (R. 182). Montgomery did not pay and the shipments stopped. On March 3, 1949, Fenwal returned the Montgomery orders which had not been accepted and advised Montgomery that on account of the failure to pay for past shipments no further shipments would be made on orders already accepted but only partially filled (R. 184).

This placed Montgomery in a difficult position. Montgomery had contracts outstanding to resell the products on order from Fenwal (R. 175). Without the Fenwal shipments Montgomery faced substantial claims for breach of contract. Fenwal, on its part, naturally wanted to continue to place its products with Montgomery's customers and, accordingly, an arrangement was worked out whereby Montgomery's contracts to sell to its customers, particularly the California aircraft companies, were assigned to Fenwal. Under the assignment Fenwal agreed to supply the products which Montgomery had undertaken to supply and to assume all of Montgomery's obligations with respect thereto (R. 54-66). At the suggestion of Montgomery it was agreed by the parties that the assignment arrangement should not affect their rights with relation to each other (R. 67).

When Montgomery persisted in its refusal to pay for goods already shipped, Fenwal brought this action. Montgomery counterclaimed for the profit it would have obtained if Fenwal had filled all orders, accepted and unaccepted, placed with it by Montgomery prior to the termination of the representation contract. Montgomery's profits on all such orders would have been \$36,525.20, assuming no cancellations, and on the same assumption the profit on orders accepted but only partially filled would

have been \$17,361.46 (R. 72). Montgomery also claimed an additional \$75,000 from Fenwal on a charge that Fenwal had improperly hired a Montgomery employee away from Montgomery, but the court below rejected this claim and Montgomery has dismissed its appeal from that portion of the District Court's order.

The indebtedness from Montgomery to Fenwal for goods sold and delivered, amounting to \$46,635.40, is undisputed. Thus the question for decision is whether Montgomery is entitled to the profit which it claims it would have realized had Fenwal accepted and filled all Montgomery orders.

SPECIFICATION OF ERRORS

1. The Court erred in making and entering its findings of fact set forth in Paragraph IV of the Findings of Fact and Conclusions of Law, which said paragraph reads as follows (R. 77-78), to-wit:

IV

"That it is true that certain orders were placed by defendants with plaintiff prior to February 28, 1949. That said orders were accepted by plaintiff, filled and delivered by said plaintiff after February 28, 1949, which resulted in a financial benefit to said plaintiff in that plaintiff realized a profit on the articles so sold and delivered, and further benefited by the continuation of business between the plaintiff and the buyers thereof; that the services rendered by defendants in obtaining and filing of said orders with plaintiff were not gratuitously performed. That pursuant to the stipulation of the parties hereto filed July 14, 1950, the profits of defendants upon all orders obtained by the defendants and filled by the plaintiff would be \$36,525.20.

“That said sum of \$36,525.20 represents the profits which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of said contract and accepted by plaintiff. Shipments of said goods were made by plaintiff to defendants’ said customers under an assignment from defendants to plaintiff, which said assignment was made without waiving the rights of either defendants or plaintiff.”

for the reason that said findings are contrary to the evidence in that the evidence is to the effect that a portion only of the orders was accepted by plaintiff and the balance of said orders was rejected by plaintiff; that pursuant to stipulation of the parties, filed herein on July 14, 1950, the sum of \$17,361.46, and not the sum of \$36,525.20, represents the profit which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of the contract and accepted by plaintiff.

2. The Court erred in deciding that defendants are entitled to their profit on all orders accepted, on a quasi-contract basis—benefit to plaintiff.

3. The Court erred in concluding that defendants are entitled to an offset in the sum of \$36,525.20 against the amount plaintiff is entitled to recover from defendants, to-wit, the sum of \$46,635.40, and in failing to conclude that the defendants were not entitled to any offset whatsoever.

4. The Court erred in rendering judgment in favor of plaintiff for the sum of \$10,110.20 with costs to neither party, and in failing to render judgment in favor of plaintiff for the sum of \$46,635.40 with interest and costs.

5. The Court erred in allowing defendants to offset profits in the sum of \$36,525.20 and in failing to consider that there should be deducted from said profits the cost to plaintiff of servicing the orders on which said profits were allowed.

SUMMARY OF ARGUMENT

Montgomery owed Fenwal \$46,635.40 for goods sold and delivered. This is admitted. Montgomery claims against Fenwal by way of setoff \$36,525.20 on account of the profit it would have received if Fenwal had accepted and filled all orders placed by Montgomery prior to February 28, 1949, the effective date of the termination of the contract between the parties. The court below improperly allowed this claim in full.

The refusal of Montgomery to pay for goods previously shipped excused Fenwal from further performance. A seller is under no obligation to make further deliveries to a buyer who has breached the contract by refusing to pay for goods already shipped or has committed an anticipatory repudiation of the contract by indicating in advance that he will not pay.

The ruling below that Fenwal has a quasi-contractual obligation to Montgomery is without foundation. No such claim was asserted by Montgomery and no such obligation exists. Fenwal's refusal to ship after Montgomery had refused to pay was both prudent and lawful. An exercise of lawful rights results in no quasi-contractual obligation. Nor did the sales to the aircraft companies under the assignment arrangement impose quasi-contractual duties on Fenwal. First, it was expressly agreed that the assignment arrangement should not affect the rights of the parties. Second, the deliveries to the aircraft companies were in dis-

charge of Montgomery's obligation to those companies, and a discharge by Fenwal of Montgomery's obligations could hardly require Fenwal to compensate Montgomery. Third, the assignment arrangement was carefully phrased in writing and it made no provision whatever for any payment from Fenwal to Montgomery.

ARGUMENT

The Court below did not undertake to say that Fenwal had violated any contractual obligation to Montgomery. There was obviously no basis for any such conclusion. On the other hand, the trial court, in deciding that Montgomery was entitled to recover from Fenwal on a quasi-contract basis, necessarily concluded that Montgomery's refusal to pay for goods previously shipped constituted a breach of the contract which precluded a recovery by Montgomery on the contract. The action of Montgomery, in refusing to make payment for goods already delivered unless its demands in other connections were met, plainly relieved Fenwal from any obligation to make further deliveries or accept further orders. The contract was silent as to time of payment (R. 5). The legal effect of the contract was, therefore, to make the price of the goods payable on delivery unless the parties, by their conduct, agreed that the writing should be modified in its legal effect in this particular. *Uniform Sales Act* § 42 (Civ. Code of Cal. § 1762; Chap. 106, § 31, General Laws of Mass.) provides:

“§ 42. *Delivery and payment are concurrent conditions.*—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange

for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

See also *National Contracting Co. v. Vulcanite Portland Cement Co.*, 192 Mass. 247, 78 N.E. 414 (1906); *United Canneries of California v. Seelye*, 48 Cal.App. 747, 192 Pac. 341 (1920); *Southern Pacific Milling Co. v. Billwhack Stock Farm*, 50 C.A.2d 79, 122 P.2d 650 (1942). The Fenwal acceptance form provided, however, credit terms of “ $\frac{1}{2}\%$ discount for cash within 10 days of date of invoice, 30 days net, interest after 30 days” (R. 93) for customers with approved credit, including Montgomery. These credit terms, it will be noted, did not specifically state the due date of payment but only the consequences of paying upon the described dates. The ambiguities in the situation were, however, effectively and conclusively resolved by the conduct of the parties. It was the established and accepted practice of the parties for payment to be made on the 10th of each month for all shipments made during the preceding month. The record is clear and unequivocal. See, for example, Montgomery’s letter to Fenwal of May 20, 1947, saying in part, “We religiously pay all our accounts on the 10th of the month” (R. 151); Fenwal’s letter to Montgomery of June 13, 1947, saying in part, “We have not, as yet, received your remittance for May and are wondering if this was sent on the 10th of the month as you had previously stated it would be” (R. 156); Montgomery’s letter to Fenwal of June 20, 1947, saying in part, “We also wish to state that we will continue to send our check promptly on the 10th of the month if you will see that your statement is mailed to us in time for us to check the bills by that time”

(R. 158); and subsequent correspondence (R. 165, 167, 170). See, also, the testimony of W. Ray Montgomery on cross examination (R. 390) which is quoted as follows:

“Q. Now, we touched this morning upon the date of payment. There wasn’t any question, was there, that the regular date of payment of your account with Fenwal Company was the 10th of each month?

A. No, sir.

Q. It was the 10th of the month regularly as the routine business of the two organizations?

A. That is right.”

The resolution by the parties of the ambiguities of their contract is, of course, controlling here. *Phillips Petroleum Co. v. Gable*, 128 F.2d 943 (C.C.A. 10, 1942); *Franklin Fire Ins. Co. v. C. & O. Ry. Co.*, 140 F.2d 898 (C.C.A. 6, 1944); *Universal Sales Corp. v. Cal. Press Mfg. Co.*, 20 C.2d 751, 128 P.2d 665 (1942); *Woodbine v. Van Horn*, 29 C.2d 95, 173 P.2d 17 (1946); *Maxwell-Davis, Inc. v. Hooper*, 317 Mass. 149, 57 N.E.2d 537 (1944); *Atwood v. City of Boston*, 310 Mass. 70, 37 N.E.2d 131 (1941); Restatement, Contracts, Section 235(e).

This meant that the balance due for shipments during January, 1949, became due February 10, 1949. That balance was not paid. About ten days later, Fenwal inquired about the January balance (R. 145). Montgomery replied and refused to pay (R. 74). The refusal, moreover, was not on the ground that the payment was not owing—the debt was not disputed—but rather on the ground that Montgomery preferred to “withhold January check until future relations are established as suggested in our letter February 6 Y 15” (R. 172). This attempt to coerce Fenwal into agreeing to Montgomery’s demands with respect to a new representa-

tion agreement totally failed. Fenwal quite properly refused to be thus forced, politely, into accepting Montgomery's terms for the new arrangement. Fenwal renewed its demands (R. 174), and when payment was not forthcoming, it returned to Montgomery all unaccepted orders and stopped all further shipments on accepted orders (R. 185-189).

The Fenwal action was fully justified. It is settled that a seller need not complete contract shipments if payment for goods already delivered is past due and not forthcoming. *Ackerman v. Santa Rosa-Vallejo Tanning Co.*, 257 Fed. 369, 372 (C.C.A. 9, 1919); *Swinehart Tire & Rubber Co. v. William Whitman Co.*, 266 Fed. 45 (C.C.A. 6, 1920); *Hayden Bros. v. Columbia Medallion Studios*, 64 F.2d 44 (C.C.A. 8, 1933); *First National Bank of Litchfield v. Pipe & Contractors' Supply Co.*, 273 Fed. 105 (C.C.A. 2, 1921); *Samuels v. W. H. Miner Chocolate Co.*, 235 Mass. 312, 126 N.E. 771 (1920); *Minaker v. California Canneries*, 138 Cal. 239, 71 Pac. 110 (1902); *Curtis v. Nye & Nissen*, 86 Cal. App. 507, 515, 261 Pac. 747, 750 (1927); *Daniels v. Newton*, 114 Mass. 530, 533 (1874); *National Machine & Tool Co. v. Standard Shoe Machine Co.*, 181 Mass. 275, 63 N.E. 900 (1902); *Hadfield v. Colter*, 177 N.Y.S. 382 (App. Div. 1919); *Lewis v. Southern Mills*, 53 F. Supp. 443, 451-52 (W.D. N.C. 1944).

Nor is this all. Montgomery in refusing to pay had made it plain that Fenwal could expect nothing until Montgomery's demands with respect to a new representation contract were accepted (R. 172). This amounted to a repudiation by Montgomery of its contractual obligations, which relieved Fenwal of any duty it might otherwise have had

to make shipments. Thus, even if it could be said that the January balance was not due, Montgomery's declaration that no payment would be made until its terms on the new contract were met relieved Fenwal of all obligation to Montgomery. Fenwal could hardly have been expected to continue to ship after Montgomery had announced that the goods would not be paid for and the unpaid balance would be used as a weapon to compel Fenwal to agree to Montgomery's demands for a new contract. The law imposed no such obligation on Fenwal. On the contrary, it is well settled that if one party announces that he does not expect to comply with the contract, the other party is discharged of his obligations under the agreement. Civil Code of California, Section 1440 provides:

"§ 1440. *When performance, etc., excused.* If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party."

See also, *Southern Pacific Milling Co. v. Billiwhack Stock Farm*, 50 C.A.2d 79, 122 P.2d 650, 654 (1942); *Bu-Vi-Bar Pet. Corp. v. Krow*, 40 F.2d 488 (C.C.A. 10, 1930); *Daniels v. Newton*, 114 Mass. 530 (1874); *Cowan v. Tremble*, 111 Cal. App. 458, 296 Pac. 91 (1931); 12 Am. Jur. 959, Contracts, Section 382; 3 Williston on Sales, 258, Section 585e. Nothing done by Fenwal constituted a violation of its contractual obligations to Montgomery.

It is equally true that Fenwal has no quasi-contractual obligation to Montgomery. The action taken by Fenwal with respect to the Montgomery orders was an exercise by Fenwal of its legal rights. The exercise of rights conferred by law creates no quasi-contractual obligation. The law, conferring on Fenwal the right to make no further shipments to Montgomery, does not at the same time require Fenwal to compensate Montgomery just as though Fenwal was obligated to make such shipments and improperly refused to do so. Nor does any quasi-contractual obligation arise from the assignment transaction. That transaction was an entirely independent arrangement entered into after the representation contract was terminated and after Fenwal had stated that it would, for the reasons assigned, make no further shipments to Montgomery. The assignment transaction was, moreover, at least as advantageous to Montgomery as to Fenwal. Montgomery had enforceable contract obligations to its customers to deliver Fenwal products to them (R. 175-176). If it could not obtain those products, it was in serious danger of becoming liable in damages. It was greatly to Montgomery's advantage for Fenwal to accept an assignment of Montgomery's contracts and to undertake to fulfill Montgomery's obligations.

By its unjustified refusal to pay for shipments previously made, which resulted in Fenwal's proper refusal to make further shipments, Montgomery placed itself in a position where it could not perform its contract commitments to its customers, including the aircraft companies. The assignment arrangement relieved Montgomery from this embarrassment. That did not give rise to any quasi-contractual right by Montgomery against Fenwal. The foundation for quasi-contractual relief is an unjust enrichment of the de-

fendant at the expense of the plaintiff. If there has been no injustice to plaintiff, there can be no quasi-contractual recovery even though the plaintiff had been enriched or benefited. *Restatement of Restitution*, Section 1, p. 13; *Bailis v. R.F.C.*, 128 F.2d 857, 859 (C.C.A. 3, 1942). Here there has obviously been no injustice to Montgomery. On the contrary, the assignment transaction was greatly to the benefit of Montgomery and Montgomery has in that connection no grievance. The injustice which is the foundation for every quasi-contractual obligation is not present.

Fenwal has no quasi-contractual obligations to Montgomery for a second reason. The assignment arrangement was evidenced by formal written contracts carefully phrased by the parties (R. 54-67). These agreements did not include any arrangement whatever for Fenwal to pay Montgomery for the privilege of discharging Montgomery's obligations to its customers (R. 54-67). When parties to a transaction have carefully phrased in writing their respective rights and obligations, there is no room for a court to create additional quasi-contractual obligations. *Haber v. Bond Stores*, 178 F.2d 836, 839 (C.C.A. 6, 1949); *Martin v. City of Port Huron*, 111 F.2d 759, 761 (C.C.A. 6; 1940); *Wolfe v. Prairie Oil & Gas Co.*, 83 F.2d 434 (C.C.A. 10, 1936); *Ogden v. Ruhm*, 7 F.2d 1007, 1009 (C.C.A. 2, 1925); *Bechtel v. Chase*, 156 Cal. 707, 712, 106 Pac. 81, 83 (1909); 17 C.J.S. 321, Contracts, Section 5.*

Finally, there is the fact that Montgomery and Fenwal expressly agreed that the assignment transaction should

*The court below provided Montgomery with quasi-contractual rights which Montgomery had never asserted and which did not exist. The court measured those rights, even if they existed, in a fashion which was plainly erroneous. The court awarded to Montgomery its full profit on the controversial orders. Quasi-contractual

not affect their rights with relation to each other (R. 67). That agreement preserves the rights of the parties as if the situation had remained at rest after March 3, 1949, that is, as if Fenwal had returned the unaccepted orders, made no further shipments on accepted orders and no further action had been taken.

This brief has pointed out that Montgomery has no rights under such circumstances. The court below was in error in recognizing any claim by Montgomery against Fenwal.

CONCLUSION

The judgment below should be reversed with directions to the court below to enter judgment for appellant for \$46,635.40 with interest and costs.

Dated: May 4, 1951.

Respectfully submitted,

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recovery at best is limited to the reasonable value of the service—as to which Montgomery produced no evidence—less the expense reasonably incurred by the defendant—in this case the expense to Fenwal of servicing the Montgomery orders. See 71 C.J. 172, Work and Labor, Sec. 155(2); *Oakley v. Duluth Superior Dredging Co.*, 223 Mich. 478, 194 N.W. 123 (1923); *Shallis v. Fiorito*, 41 Ida. 653, 240 Pac. 932 (1924); *Viles v. Kennebec Lumber Co.*, 118 Me. 148, 106 Atl. 431 (1919). Thus the decision below cannot stand for the single reason, if for no other, that the measure of recovery allowed to Montgomery is totally in error.

No. 12,777

IN THE

United States Court of Appeals
For the Ninth Circuit

FENWAL, INCORPORATED

(a corporation),

Plaintiff-Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H.

MONTGOMERY, and MONTGOMERY

BROTHERS, a partnership,

Defendants-Appellees.

APPELLEES' REPLY BRIEF.

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APPELLEES' REPLY BRIEF.

STATEMENT OF CASE.

Montgomery Brothers, a copartnership consisting of Frederick H. Montgomery and W. Ray Montgomery, has been in the business of representing Eastern manufacturers since 1920 (R. 313). In the representation of Eastern manufacturers the practice was to purchase the articles at a price, and resell them at a profit.

In 1942 Montgomery and Fenwal entered into a contract similar to the one involved in these proceed-

ings, and thereafter the annual purchases from Fenwal were as follows: In 1942, \$39,876.18; 1943, \$63,077.64; 1944, \$75,636.57; 1945, \$228,609.73; 1946, \$256,169.78; 1947, \$229,895.00; and 1948, \$266,822.06.

The sales by Montgomery of the articles involved in these purchases during the same years were as follows: 1942, \$47,712.91; 1943, \$80,875.64; 1944, \$83,950.07; 1945, \$292,279.79; 1946, \$347,603.72; 1947, \$284,258.49; and 1948, \$356,920.44 (R. 321).

The difference between the purchase price and sales price was Montgomery's profit on these transactions during the years involved.

By the agreement dated May 26, 1944, the same business relations were continued as existed under the prior contract. This contract provides for no time of payment by Montgomery, and provides that Montgomery will use its best efforts to obtain orders for switches, and further provides that the agreement shall continue in force until terminated by either party, but may be terminated by either party upon sixty days' written notice given by the ordinary manner to the last known address of the other party (R. 86).

Montgomery had established a line of credit which was satisfactory to Fenwal, and it was so stipulated at the trial (R. 210). Fenwal never advised Montgomery that the failure to pay one invoice or statement would cause Fenwal to desist and discontinue business (R. 354-355). In 1947 the January, February and March invoices were all received at one time

(R. 151). No default on the contract was claimed or deliveries refused.

In the performance of the contract Montgomery would place the order with Fenwal. Fenwal, during the entire time of performance under any of its contracts with Montgomery, accepted all orders and never refused to accept any order (R. 207, 208, 209 and 216). Very often the orders were placed without release or delivery dates (R. 88), as the aircraft companies couldn't give those dates at that time, but they would be sent just as quickly as they were received by Montgomery (R. 328).

On December 29, 1948, Fenwal wrote to Montgomery as follows:

"This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty days after the receipt by you of this letter.

We believe it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone, but we shall be glad to confer with you about this if you feel that it is desirable that we do so" (R. 96 and 97).

On January 7, 1949, Montgomery answered Fenwal's letter of December 29th which, in part, is as follows:

"We have expended large sums of money and unlimited man hours by our sales and engineering staff in developing applications and securing orders for your equipment * * *.

Third, you are acting within the terms of our Sales Agreement in terminating same as you have elected to do. However, we will expect you to accept all orders that we place with you until the date of termination of the before-mentioned Sales Agreement regardless of the release schedules and the date of actual shipments as called for in our purchase orders.

* * * we will welcome the opportunity of discussing any matters with Mr. Storkerson as undoubtedly he is planning a trip to the Pacific Coast'' (R. 99 and 100).

Telegrams were exchanged between Montgomery and Fenwal, and an appointment was arranged in San Francisco for January 24th (R. 102 and 103).

Storkerson, the General Manager of Fenwal, arrived in San Francisco on January 24th and had a conference with W. Ray Montgomery and Fred Montgomery. The purpose of his trip was to try to work out a termination agreement with Montgomery (R. 107, 223, 224, 225, 237, 298 and 342). At this conference on January 24th Storkerson stated that he came to talk over with Montgomery the possibilities of some settlement of the whole affair (R. 198), and handed Montgomery a letter dated January 20, 1949, from Fenwal answering Montgomery's letter of January 7, 1949. In this letter Fenwal states:

“* * * we shall not try to discuss details in this letter.

Our Mr. Storkerson will talk with you in San Francisco in the near future, and it is our hope that you and he will be able to work out a mu-

tually satisfactory plan for handling the problems which are involved in the termination of our business relationship" (R. 104, 105 and 106).

At this conference Storkerson said: "I said that on all orders which we hadn't accepted that were to be shipped or where shipments were to be made against them after the end of the termination period, that I felt an adjustment should be made in the profits to be allowed Montgomery Brothers. And I believe I made some suggestions on it" (R. 109).

Storkerson further stated: "The reasons I gave for the proposal were to give them a fair and equitable settlement arrangement to the best of our ability. And, further, we discussed, I am sure, and as I remember it, the fact that there would be a problem involved in this termination and that I felt that the orders—continuing orders after the termination date would have to be assigned to our company * * *" (R. 110).

Storkerson further testified: "That led up to the question of what we were going to do on the basis of our probable acceptance of the termination terms, and I suggested to Mr. Ray Montgomery that the best way to handle it I thought would be for he and I together to visit the various aircraft companies who were the principal accounts, particularly in the Los Angeles territory, and announce to them a cessation, the effort being that while we knew that eventually and as soon as possible that—and we discussed this—that assignments would have to be made in that area

for that to be handled properly, we did not wish to involve customers who really had nothing to do with the business between Fenwal and Montgomery Brothers. So it was agreed that we would proceed on that basis" (R. 113 and 298).

Ray Montgomery and Storkerson met in Los Angeles on January 27, 1949, for the purpose of straightening out affairs with various aircraft companies in Los Angeles (R. 114). Several aircraft manufacturers were called upon, and the conversation at each meeting was substantially the same. Montgomery did most of the talking and stated that Montgomery Brothers was going to cease representing Fenwal in the area on March 1st, and that Fenwal would be operating directly with the aircraft companies, and that Fenwal would get in touch with them later. Montgomery thanked them for the business they had given them, and told them that he hoped to be able to continue on in the northern territory representing Fenwal. He further stated that Fenwal and Montgomery were in agreement that the termination should take place. This conversation was had at all of the aircraft companies, and it took a period of several days to contact the companies (R. 116). It was further stated that everybody wanted to make the transition as smooth as possible for the customers (R. 41 and 232). Fenwal was to make no sales on its own behalf during the months of January and February, 1948 (R. 230).

Storkerson testified as follows: "I had already previously told him (Ray Montgomery) that we would,

under no circumstances entertain the idea of renewing any contract with Montgomery Brothers which would be set up on the basis of the one we had just cancelled" (R. 117).

Montgomery carried on its usual activities of getting all possible orders and pressing orders, and keeping their customers satisfied, during the months of January and February (R. 230, 237 and 389).

Montgomery's profit for orders lodged with Fenwal in January and February, 1948, was \$36,525.20 (R. 72).

Montgomery was to take on the business in January and February and to place orders during that time. Fenwal made no sales during the interim (R. 230), and Montgomery was to continue the normal pursuit of orders and to solicit the same (R. 231).

In 1947 Montgomery Brothers complained that there was a three months' delay in billing from Fenwal, and stated that they would like to have statements before the tenth of each month because it was difficult for Montgomery Brothers to check the accounts unless monthly statements were received (R. 151). The statements provided for a discount if the bills were paid before the tenth (R. 147), and later on the discount rate was changed from 1% to one-half of 1% (R. 170).

Montgomery Brothers were proceeding to obtain all possible orders and operating under the agreement before March 1st, and while negotiations were being

carried on to determine the profit that Montgomery was to receive for orders placed before March 1st but not to be delivered until after March 1st. Fenwal sent a telegram on February 21, 1949, as follows: "January check not received. Please advise whether sent" (R. 145). Montgomery Brothers responded on February 23rd as follows: "Prefer to withhold January check until future relations are established as suggested in our letter February 6 Y 15" (R. 172).

On February 24th Fenwal threatened to stop shipments and notify customers of reason and arrange to satisfy them on deliveries, whereupon Montgomery wired that the contract did not provide for payment on February 10th, and that if Fenwal interfered with their contracts with customers Fenwal would be held in damages (R. 175 and 176).

Montgomery Brothers at that time were bound to deliver on all orders which had been taken from the aircraft companies during January and February and which had been taken with the consent and approval of Fenwal, with no notification of a refusal to accept the orders. The articles to be sold were all patented articles and could not be obtained by Montgomery Brothers from any other source than Fenwal (R. 118).

On February 25th Fenwal for the first time stated in a telegram "the terms on our order acceptances and invoices which you hold are one-half per cent 10 days net 30 days permission to pay the month's bill-

ings on the 10th of the following month was per a special agreement * * *'' (R. 117 and 178).

On February 26, 1949, Montgomery wired that they were not refusing payment of invoices and that they expected all Fenwal customers to be protected by prompt deliveries (R. 180).

Fenwal wired Montgomery on February 28, 1949 (being the last day of the termination period) that they would discontinue shipments on orders (R. 182).

On March 3, 1949, after the termination date, Fenwal wrote to Montgomery attempting to cancel certain orders (R. 185, 186, 187, 188 and 189).

On March 5th Montgomery wired Fenwal that no amounts were admittedly overdue, and that Fenwal would be held liable in damages for all contracts which were cancelled (R. 189 and 190).

Thereafter Storkerson met Ray Montgomery on March 9, 1949, in Los Angeles and Storkerson testified the following occurred: "I suggested that we arrange for assignments immediately so that the customers could be taken care of and that shipments could be released to the various people who were expecting shipments here on the west coast (R. 192 and 193).

An agreement was prepared and signed between Montgomry and Fenwal providing for the assignment to Fenwal of any and all unfilled orders for Fenwal products (R. 195), and thereafter assignments were

made specifically covering each of the aircraft companies involved (R. 54-66).

Fenwall filled all orders which had been obtained from Montgomery Brothers in which transactions Montgomery Brothers had a profit of \$38,103.18, subject to adjustment for rejections, which net amount was stipulated to be \$36,525.20 (R. 72). It is this amount that is in controversy and for which the trial Court rendered a judgment in favor of Montgomery Brothers.

ARGUMENT.

The contract between the parties was one for purchase and sale. Montgomery agreed to purchase at certain prices and Fenwal agreed to sell at those prices (R-6, Articles III and IV). Montgomery was to be Fenwal's exclusive representative in that territory (R. 5, Article I). The relationship between the parties was to be that of buyer and seller and not that of employer and employee. The agreement could be terminated by either party upon 60 days' written notice. The contract was silent as to any of the problems that should arise should the termination provision be exercised.

On December 29, 1948, Fenwal mailed to Montgomery a notice of termination (R. 96), and on January 7, 1949, Montgomery acknowledged the termination notice but informed Fenwal that Montgomery expected the buyer-seller relationship to continue during the interim period (R. 98 and 99).

The position taken by Fenwal required Montgomery to continue to represent Fenwal under the contract; however, Fenwal would honor only those orders forwarded by Montgomery that Fenwal chose to accept, and Fenwal would not allow Montgomery any profits on orders accepted by Fenwal that were to be delivered after the 60-day termination period. On January 20, 1949, Fenwal wrote Montgomery as follows:

"We note you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of release and dates of shipment, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. * * * It seems likely that the filling of these orders will involve an adjustment of the discount or commission allowed to you, * * * We cannot be required to accept orders given by you or by anyone else * * * we are surprised that you think we should fill orders in the manner outlined in your letter." (R. 105).

Mr. John Storkerson, testifying for Fenwal, said:

"* * * our position was that they were not entitled to profits after the 60-day period." (R. 109.)

Montgomery contended that this was an unwarranted condition and could not be implied from the termination provision. *The Uniform Sales Act*, Section 42 (Civil Code of California, Section 1962; Gen-

eral Law of Massachusetts, Chapter 106, Section 31, Appellant's Brief, page 9) provides:

"Section 42: Delivery and Payment are Concurrent Conditions.—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, i.e., *the seller must be willing and ready to deliver possession of the goods to the buyer in exchange for the price* * * *" (Italics ours).

There was a conflict of testimony as to the right of Fenwal to refuse any or all of the orders submitted by Montgomery during this period. The Court properly found that Fenwal had no legal right to refuse any of the orders submitted by Montgomery and made a finding that, as a matter of law, all orders submitted by Montgomery during the termination period had been accepted by Fenwal (R. 77, Article IV). All of these orders were actually filled and delivered by Fenwal. *The finding that there had been no breach of contract by Fenwal is dependent upon the finding that all orders forwarded by Montgomery had been accepted.* These two findings must stand together.

The bone of the contention of Fenwal lies in the unwarranted assumption that Fenwal could rescind the contract on grounds of an alleged material breach by Montgomery. This assumption has no grounds, either in logic or law.

In the first place, the conduct of the parties clearly showed the lack of any intent to make delivery and

payments concurrent conditions. Such a construction had never been exacted—all transactions had been on a credit basis. In the plaintiff's Exhibit No. 15, dated May 20, 1947, Montgomery wrote Fenwal:

“* * * the last statement we received from you was for January, February and March period. This was not sent us until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statment every month.” (R. 151.)

This clearly shows that with respect to the contract in question, *at the time that that contract was entered*, there was no intent on the part of Fenwal to receive payment 10 days after shipment. The contract contains no date for payment. In fact, Fenwal's invoices were rendered on a haphazard schedule that made it difficult for Montgomery to check.

During the entire period of the contract, both Fenwal's acceptance order (R. 92) and invoice (R. 147) contained terms allowing a discount by the purchaser if the balance should be paid within 10 days. Montgomery subsequently negotiated for the privilege of receiving this discount, and Fenwal agreed to grant the discount for early payment (Plaintiff's Exhibits 19 and 20, R. 167, 170).

This subsequent agreement provided that if Montgomery should choose to pay in 10 days, they would be allowed a discount. This agreement was collateral to the original agreement and presented no condition

of immediate payment, but was clearly an option allowing Montgomery an additional profit if he chose to pay earlier than on the haphazard schedule manifested by the parties. The mere fact that Montgomery chose to avail themselves in the past of an optional discount cannot obligate Montgomery to always choose to pay earlier.

The parties attempted by discussion and correspondence to settle the question of construction of the termination clause. Fenwal requested (R. 102) and Montgomery agreed (R. 103) to meet to discuss an amicable settlement of their differences. The parties met and discussed the matter in great detail; a settlement was tentatively arranged on the basis of a different measure of recovery for Montgomery and a new contract for representation (R. 74 and 75). Pursuant thereto, a written contract was tendered by Fenwal (R. 127 through 133) and Montgomery submitted their points of difference as to their understanding of the previous oral agreement (R. 134 through 142). The trial court found that the points of discussion in the attempt to reach an agreement of settlement involved the future contract for representation (R. 74 and 75). Fenwal attempted to separate the issues, and insisted that Montgomery pay the amount Fenwal claimed was due to Fenwal before proceeding with the contract for future representation (R. 174). Fenwal, in spite of Montgomery's contention that the two issues were dependent (R. 172) terminated the negotiations for a settlement. Since the parties were

unable to agree, Montgomery was entitled to a court construction of the terms of the termination provision. *Papenfuss v. Webb Products Co.*, 24 Cal. App. (2d) 559, 563; *Restatements of Contracts*, Section 302 a.2.

In addition, the contention of Fenwal that Fenwal rescinded the contract is in variance with the facts. Equity will not recognize the rescission of a contract when the rescinding party subsequently takes the benefits under the contract. *Neet v. Holmes*, 25 Cal. (2d) 447, 458, 154 P. (2d) 854. It desires to retain the \$36,525.20 profit which was the result of Montgomery Brothers' efforts. Fenwal attempts to rescind the orders that Montgomery had placed with Fenwal, and at the same time, accepts the benefits of those orders. Equity will not permit both. When Fenwal accepted the assignment of those orders, Fenwal accepted the benefits under the contract.

Fenwal vainly attempts to abrogate that rule of equity by stating that the assignment was under a carefully worded written contract, and, where the parties have so done, there is no room for a court to create additional obligations (Appellant's Brief, page 15). This statement ignores the fact that this contract was deliberately worded so that none of the rights of either party were set forth therein or affected thereby all the rights and obligations of both parties are incorporated into that assignment only by reference, and not by enumeration.

The last contention made by Fenwal is that the finding of the trial court that Montgomery had a right to recover in quasi contract necessarily requires as a premise that the contract between Fenwal and Montgomery had been validly rescinded by Fenwal.

The attention of the court is respectfully called to the following facts: that that contract required Montgomery to continue to obtain and forward orders to Fenwal throughout the entire 60-day period; that the very nature of these orders required scheduled shipments extending long beyond the termination period; that at the time of the assignment, the 60-day period subsequent to the termination notice had run its course and the contract had terminated; that under the course of business prior to termination, Montgomery had recovered its profits from the customer and not from Fenwal; and that the termination of the contract made it impossible for Montgomery to continue business with Fenwal's customers for the purpose of collecting for the orders previously placed.

Because it is the clear intent of the contract and of the parties that Pacific Coast customers should not deal with different representatives of Fenwal for contracts given at different dates, it became necessary that Montgomery assign its contracts to Fenwal. This assignment was a necessary result of the termination provision, and equity will construe the contract to so provide. *Restatement of Contracts*, Section 262; *California Civil Code*, Section 1655; *Acme Oil & Min. Co. v. Williams*, 140 Cal. 681, 685, 74 Pac. 296.

Just as the contract required, by implication, that the contracts be assigned, it likewise implied that Montgomery would be reimbursed by Fenwal for the services rendered. *Restatement of Restitution*, Section 107 (2); 1 *Corbin on Contracts* 322, Section 102.

It is uncontroverted that the orders were obtained at the special instance and request of Fenwal; that it was well known to Fenwal that pursuant to that request Montgomery expended time, effort and money to obtain the orders; that Montgomery's services were not performed gratuitously; and that these services resulted in a great benefit to Fenwal both financially and in good will.

Where the contract is silent as to the terms of termination, the law does not allow an unjust enrichment and will imply conditions in quasi contract.

Corbin states in his treatise on *Contracts*, Vol. 3, page 161, Section 561:

“What is an implied promise and what is the process called ‘implication’? These are variable terms. When a court finds a promise by implication, its procedure may be nothing more than ordinary interpretation of word symbols. It may be the interpretation of a person's acts and conduct not including words; it may be the judicial determination that a legal duty exists, stating the result in the language of promise without doing anything that can properly be called interpretation; or it may be a combination of any two of these or of all three at once.

When a promise is said to be ‘implied in fact’ we are describing one that is found by interpre-

tation of a promisor's words or conduct. When a promise is said to be 'implied in law,' we are declaring the existence of a legal duty created otherwise than by assent and without any words or conduct that are interpreted as promissory. *As a substitute for contract 'implied in law,' the term quasi contract is now often used, * * ** (Italics ours).

On page 181 of the same volume, Corbin quotes from Webber, *The Effect of War on Contracts*, Ed. 2 (1946), page 414:

"The time has come to shed the fiction of 'implied contract' and regard the doctrine as a *mode by which, upon the facts of a case, the court itself does justice in circumstances for which the parties never provided.*"

The trial court refused to find that any of Montgomery's acts deprived Montgomery of its right to call for "a court evolved formula for construction of the termination clause" (R. 74). The nature of the contract required Fenwal to reimburse Montgomery for services rendered and benefits received.

The prior contract between the parties is ample evidence of the understanding of both parties as to the value of Montgomery's services. If Fenwal wished to show other factors contributing to a different finding, such evidence would have been received by the Court. There was no proffer, and the Court's ruling is amply supported by the evidence.

CONCLUSION.

A reading of the cases cited by counsel show that they are inapplicable to the factual situation presented. Each case refers to the law applicable where the transaction is on a cash basis, whereas each transaction involved in the instant case was admittedly on a credit basis.

The Court did not err in holding that Montgomery was not deprived of the right to call for a court evolved formula for construction of the termination clause.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Dated, San Francisco, California,

July 9, 1951.

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No. 12,777

IN THE

United States
Court of Appeals

For the Ninth Circuit

FENWAL, INCORPORATED, a corporation,

Plaintiff-Appellant

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a partnership,

Defendant-Appellees

Appellant's Reply Brief

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No. 12,777

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Defendant-Appellees

Appellant's Reply Brief

On February 21, 1949, when Fenwal wired Montgomery
"JANUARY CHECK NOT RECEIVED. PLEASE
ADVISE WHETHER SENT." (R. 145)

neither of them had breached their contract in any way.
The situation was that Fenwal had given appropriate notice
of termination which Montgomery had acknowledged, and
discussions had occurred in regard to what Montgomery's
profit should be on orders taken after notice of termination

for future delivery as to which Fenwal—not Montgomery—would have the service obligation and credit risk.

January shipments by Fenwal, amounting to \$30,359.53, had been billed to Montgomery in a statement which Montgomery received February 7, 1949 (R. 363), and under the practice established between the parties this statement would normally have been paid by February 10th. But it had not been paid on February 21st; so Fenwal sent the wire quoted above. Montgomery replied on February 23d as follows:

“RETEL PREFER TO WITHHOLD JANUARY CHECK UNTIL FUTURE RELATIONS ARE ESTABLISHED AS SUGGESTED IN OUR LETTER FEBRUARY 6Y15. BEST REGARDS.” (R. 172)

After an exchange of wires, Montgomery reaffirmed its position by a telegram dated February 26, 1949, to Fenwal, reading as follows:

“RETEL WE ARE NOT REFUSING PAYMENT YOUR INVOICES AND NEVER HAVE BUT WE PREFER TO WITHHOLD PAYMENT JANUARY INVOICES UNTIL SALES AGREEMENT IS SIGNED AS PER OUR LETTER FEBRUARY FIFTEENTH. WE ARE VERY ANXIOUS TO CONTINUE OUR VERY PLEASANT BUSINESS RELATIONS BUT MUST HAVE SUFFICIENT TIME TO PROTECT OUR LARGE INVESTMENT IN YOUR LINE. WE HAVE NEVER STOPPED FOR ONE MINUTE PROMOTING SALES AND EXPECT ALL FENWAL CUSTOMERS TO BE PROTECTED BY PROMPT DELIVERIES. BEST REGARDS.” (R. 180)

Thus Montgomery refused to pay except upon a condition, viz., the execution of a new sales agreement. The \$30,359.53

obligation for January shipments was unconditional and it was due. This refusal to pay an unconditional obligation for goods shipped, except upon a condition, was a clear breach of the contract and excused Fenwal from making any further shipments. The applicable authorities are cited at page 12 of Appellant's Opening Brief. Montgomery, while withholding payment, believed that Fenwal was in a "weak" financial condition (R. 303-304, 388), and obviously thought that withholding payment would bring Fenwal to Montgomery's terms on a new contract.

Even if it be assumed that the obligation to pay for goods shipped in January was not yet due on February 21, 1949 (an assumption without any support in the record), the refusal of Montgomery to pay except upon the execution of a new sales agreement was notice to Fenwal that Montgomery would not perform, and under California Civil Code Section 1440 and the authorities cited at page 13 of Appellant's Opening Brief, Fenwal was relieved of any obligation to make further shipments.

Montgomery's position is that it was entitled to continuing shipments, notwithstanding its refusal to pay an unconditional obligation for shipments previously made. We submit that this proposition is unsound. When Montgomery refused to pay, Fenwal was relieved of the obligation to make further shipments or to fill any more orders. It follows that Montgomery cannot have its profit on orders which Fenwal was not required to fill.*

*The District Court allowed Montgomery profit on orders in two classifications: on Montgomery orders which Fenwal accepted prior to termination date (the profit amounting to \$17,361.46, R. 72) and on orders which Fenwal never accepted (the profit amounting to \$19,163.74, R. 72). Montgomery's refusal to pay what was admittedly owing and the plain indication that no payments would

Appellee's brief (p. 15) speaks of Fenwal's "rescission" or attempted rescission. Fenwal did not rescind nor attempt to rescind, nor was there any occasion for it to do so. It simply refused to make further shipments after notice from Montgomery that payment for past shipments would be withheld until a new contract was signed on Montgomery's terms. We have shown that Fenwal was legally justified in this position, and from the economic standpoint it would, of course, have been foolish, if not suicidal, for Fenwal to continue shipping without receiving payment for goods already shipped.

Most of the orders to Montgomery from its customers were assigned to Fenwal by Montgomery with the consent

be made until Montgomery's independent objectives were achieved relieved Fenwal of all obligation to Montgomery. Moreover, as to orders in the second group, that is, those which Fenwal had never accepted, no obligation from Fenwal to Montgomery ever arose. The representation agreement provides that it "is to be construed and interpreted under the laws of" Massachusetts (R. 7). Under Massachusetts law contractual obligations between Fenwal and Montgomery arose only with respect to accepted orders and as to all unaccepted orders Fenwal had no obligation whatever. See *Eastern Paper & Box Co. v. Herz Mfg. Corp.*, 323 Mass. 128, 80 N.E.2d 484, 486 (1948).

"Such an arrangement, if we assume it was not lacking in mutuality and consideration from the very beginning, *Bernstein v. W. B. Mfg. Co.*, 238 Mass. 589, 131 N.E. 200; *Gill v. Richmond Co-op. Ass'n, Inc.*, 309 Mass. 73, 34 N.E.2d 509, would amount to no more than an offer to enter into a unilateral contract as to each particular order which would ripen into such a contract upon the obtaining of an order by the plaintiff and its acceptance by the defendant but which would not prevent the defendant from withdrawing the offer as to future orders which the plaintiff might secure after notice of such withdrawal nor fasten any liability upon the defendant if it saw fit to sell directly to the United without paying the plaintiff any commission on the sales thereafter to the United."

See also *Gill v. Richmond Co-op. Ass'n*, 309 Mass. 73, 34 N.E.2d 509 (1941).

of Montgomery's purchasers under the letter agreement of March 9, 1949 (R. 194). After Montgomery refused to pay Fenwal for goods shipped and Fenwal refused to make further shipments, Montgomery was in peril of liability to its customers whose orders it had accepted. The orders to Montgomery from its customers were the basis for Montgomery's orders to Fenwal which the latter cancelled when Montgomery refused to pay. Irrespective of Fenwal's justification in cancelling the orders it received from Montgomery, because of Montgomery's refusal to pay, Montgomery remained bound to its customers on their orders and would be exposed to a substantial liability to them for non-performance. Thus Montgomery was greatly benefited by having those orders assigned to Fenwal and filled by it. This assignment transaction, though of benefit also to Fenwal in establishing a direct relationship with Montgomery's customers, affords no possible basis for a quasi-contractual recovery by Montgomery against Fenwal. The Court will note the important fact that the orders assigned to Fenwal and filled by it were *not* the same orders which Fenwal had cancelled because of Montgomery's refusal to pay, but were orders to Montgomery from its customers and which were of no concern to Fenwal prior to the assignment. The assignment agreement was an express contract, supported by an independent consideration, and specifically stated that it should not affect the rights of the parties. It did not affect the Montgomery to Fenwal orders which had been cancelled. As to them, Montgomery contended, as it does now, that it was entitled to have its orders filled, notwithstanding its refusal to pay for the earlier shipments; whereas Fenwal contended, as it does now, that Mont-

gomery's refusal to pay excused it from making further shipments. That question remained open when the assignment agreement was made and it is the question now before the Court.

Montgomery's cross-complaint was on its principal contract with Fenwal (R. 15-17), not upon any theory of quasi-contract arising out of the later assignment of the orders it held from its customers. The trial court, having concluded that Montgomery could not recover on the principal contract because of its unjustified refusal to pay for goods shipped, gratuitously and, we submit, erroneously, decided that Montgomery should recover on a quasi-contract theory that Fenwal received a benefit from the assignment of Montgomery's contracts with its customers. The difficulty with this approach is, first, that it ignores the fact that the assignment was under an *express* contract, supported by an independent consideration—benefit to Montgomery*—and affords no basis for recovery upon a theory of implied contract; and, second, it assumes, without any evidence, that the benefit to Fenwal under the assigned orders from Montgomery's customers was the same as Montgomery's expected profit upon the orders which it placed with Fenwal, and which Fenwal rightly cancelled because of Montgomery's refusal to pay—thus taking no account of Fenwal's expense in connection with the assigned orders or of the fact that Fenwal was compelled to bring a lawsuit against Montgomery for moneys admittedly due under the principal contract.

*The assignments in each instance provided that Fenwal would "assume all of the obligations of Montgomery Brothers under the subject purchase orders and will perform and comply with the terms and conditions thereof." (R. 55, 57, 59, 61, 63, 65.)

Appellees made no claim for recovery in quasi-contract and the court below erred in permitting recovery upon that ground. Therefore, the judgment must be reversed.

Dated: July 18, 1951.

Respectfully submitted,

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No. 12,777

IN THE

United States Court of Appeals
For the Ninth Circuit

FENWAL, INCORPORATED
(a corporation),

Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY, and MONTGOMERY
BROTHERS, a partnership,

Appellees.

APPELLEES' PETITION FOR A REHEARING
and
MOTION TO STAY MANDATE.

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FILED

JAN 23 1952

PAUL P. O'BRIEN

CLERK

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No. 12,777

IN THE

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(a corporation),

Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY, and MONTGOMERY
BROTHERS, a partnership,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellees, W. Ray Montgomery, Frederick H. Montgomery, and Montgomery Brothers, a partnership, respectfully petition for a rehearing in the above entitled cause. The following ground is urged:

1. The findings of the district court that appellees were entitled to an offset of \$36,255.20 against the claim of appellant were supported by substantial evidence and were not clearly erroneous, and this court erred in reversing the judgment decreeing such off-

set and ordering judgment for appellant for the full amount of its claim.

1. THE FINDINGS OF THE DISTRICT COURT THAT APPELLEES WERE ENTITLED TO AN OFFSET OF \$36,255.20 AGAINST THE CLAIM OF APPELLANT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND WERE NOT CLEARLY ERRONEOUS, AND THIS COURT ERRED IN REVERSING THE JUDGMENT DECREERING SUCH OFFSET AND ORDERING JUDGMENT FOR APPELLANT FOR THE FULL AMOUNT OF ITS CLAIM.

Three procedural questions call for preliminary comment. The first of these questions involves the contention in appellant's reply brief (p. 7) that "appellees made no claim for recovery in quasi-contract and the court below erred in permitting recovery upon that ground". This court apparently adopted the same view, for it stated at page 2 of its opinion that:

"The Montgomerys sought no amendment below to the cross complaint changing the issue from one based on the breach of the written contract to one in quasi contract, nor do they seek it in this court."

No amendment of pleadings by appellees was necessary either in the trial court or in this court. Appellees asserted an offset in their answer (T 14) as well as in their cross complaint (T 15-17), and the allegations of the answer respecting offset were broad enough to permit quasi contract relief. Moreover, it is always competent for a trial court to grant quasi contract relief when all the facts are before it and the facts justify that kind of relief. (*Schenley Distillers Corp.*

v. Kinsey Distilling Corp., 3 Cir. 1943, 136 F. 2d 350, 352.) Again, all the facts upon which quasi contract relief could be granted were before the trial court in this case, and they came into the record with the consent of the parties. That in itself would require this court to treat quasi contract relief as if raised by the pleadings. (*Rogers v. Union Pac. R. Co.*, 9 Cir. 1944, 145 F. 2d 119, 123; Rule 15 (b), Federal Rules of Civil Procedure.)

The second procedural question relates to appellate review of evidence. Rule 52 (a) of the Federal Rules of Civil Procedure prescribes:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

Recent decisions of the Supreme Court have defined the scope of this Rule. In *United States v. National Assn of Real Estate Bds.*, 339 U.S. 485, 495-496, 70 S.Ct. 711, 717, 94 L.Ed. 1007, it is said:

“It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. (Citations.) We are not given those choices, because our mandate is not to set aside findings of fact ‘unless clearly erroneous.’ ”

And in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342, 70 S.Ct. 177, 179, 94 L.Ed. 150, it is said:

“Findings as to the design, motive and intent with which men act depend peculiarly upon the

credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that which the Government contends. It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even if findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.' "

The decision of this court in *Paramount Pest Control Service v. Brewer*, 9 Cir. 1949, 177 F. 2d 564, is in accord with the rules announced by the Supreme Court in the cases just cited. It is there said by this court, at page 567:

"A presumption of correctness attaches to the findings of the District Court. *United States v. Foster*, 9 Cir., 1941, 123 F. 2d 32, and under Rule 52 (a), Federal Rules of Civil Procedure, 28

U.S.C.A., the trial judge's findings of fact will not be set aside unless clearly erroneous. The rule applicable here in the light of the conflicting character of the evidence in the record before us has been aptly stated in *Federal Savings & Loan Ins. Corp. v. First Nat. Bank, Liberty, Mo.*, 8 Cir., 164 F. 2d 929, 932, in this language: 'We are not at liberty to substitute our judgment for for that of the trial court and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained.' "

In a later part of this petition, the appellees undertake the demonstration that the decision in this case is not in accord with the rules thus announced by the Supreme Court.

The final procedural question relates to the scope of the reversal. The trial court was ordered to enter judgment for appellant for the full amount of its claim without opportunity for appellees to supply any deficiency of evidence respecting offset. Appellees urge that at all events they are entitled to that opportunity. They invoke the just rule stated and applied in *Sachs v. Ewing*, D.C. 1943, 133 F. 2d 403, 404-405, as follows:

"There was no evidence which would have supported a judgment against appellee Ewing on the loans in suit. But if these loans were actually made, as the books showed and as both Samuel and the appellant testified, appellant is entitled to judgment against the corporation. Since that

evidence was undisputed, and practically identical with the evidence concerning the loans which the court in effect found to have been made, and since the court apparently decided the case on the theory that appellant was bound by the resolution of September 20, we might perhaps take it as established that the loans in suit were made, and direct final judgment for appellant. *But to avoid risk, however slight, or invading the fact-finding function of the trial court, we merely remand the case for further proceedings consistent with this opinion.*” (Emphasis added.)

The effect of the decision of this Honorable Court even deprives appellees of a judgment for the amount of \$17,361.46 which was the amount stipulated that the appellees would be entitled to if profit were allowed on all orders accepted prior to the effective date for delivery thereafter less profit on such orders as might have been cancelled by the purchaser. (T. 72 and 73).

The paramount question, of course, is whether this court was in error in concluding in its opinion that there was not enough evidence in the record to support an offset in favor of appellees under the doctrine of quasi contract.

The doctrine of quasi contract is summed up in the working hypothesis that by the ties of natural justice and equity one person shall not unjustly profit through another's loss. It was announced by Lord Mansfield in 1760 in the pioneer case of *Moses v. Macferlan*, 2 Burr. 1005.

In *Schenley Distillers Corp. v. Kinsey Distilling Corp.*, 3 Cir. 1943, 136 F. 2d 350, 352, it is said:

“Plaintiff was, like any other owner of goods stored without warehouse receipts or in the absence of express contract, bound by contract implied in law or quasi-contract to pay defendant a warehouseman’s fair and reasonable charges. *Gay v. Bates*, 99 Mass. 263. * * * Quasi-contractual obligations are imposed or created by law without regard to the assent of the party bound, in order not to permit unjust enrichment. They have been enforced by the courts ever since Lord Mansfield’s opinion in the cases of *Moses v. Macferlan*, 2 Burr. 1005 (K.B. 1760.) * * * It has thus become the settled law that a quasi-contract arises where the law enforces a duty upon a person, not because of any express or implied promise on his part to perform it, but even in spite of any intention he might have to the contrary. We said in *Bailis v. R.F.C.*, 3 Cir. 1942, 128 F. 2d 857, 859, that “Unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to do or to forebear doing a particular thing. A quasi-contract does not arise out of a promise. See Restatement, Contracts (1932), sec. 5. In fact it is imposed in direct opposition to the intention of the party charged therewith. Such contracts are the means which the law has adopted to raise up obligations in order to promote justice.’ ”

In modern terminology the doctrine of quasi contract is usually referred to as the doctrine of unjust enrichment or the doctrine of restitution. Thus in

Restatement, Restitution, section 1, it is said that "A person who has been unjustly enriched at the expense of another is required to make restitution to that other".

The latest work on the subject is Professor Dawson's *Unjust Enrichment*, published in 1951, where it is said:

"It is broadly true of the modern remedy in the United States that there are no distinctions based on the form or nature of the gain received. Lord Mansfield applied his remarks to the 'common count' for money had and received, which presupposes a transfer or at least a receipt of money. But we have other counts that are almost as common and the same tests apply to them. The benefit may consist of the acquisition or use of chattels, services rendered or acts performed, the use of ideas, or the discharge of an obligation. The list is not yet closed. (p. 22.) * * *

"As to grounds there has been a similar expansion. The main work of quasi-contract has been in the field of express contract, awarding value restitution of performance rendered in actual or supposed conformity with contractual obligations. The modern expansion of grounds for rescission of contract has provided more work to do. (p. 23.) * * *

"The most obvious comment about the American law of restitution is that it lacks any kind of system. This condition is not peculiar to the law of restitution. We generally pride ourselves on our lack of system. When anyone ventures to construct a system, we all set cheerfully to work

to destroy it. The price we pay for this includes among other things, a serious and growing confusion in analysis, a lack of overall intelligibility, and much difficulty in prediction. This price we are paying now in the field called restitution. Confusion is probably inevitable in any large body of doctrine that has grown so rapidly, from so many different directions, by the methods of case law. To this point our gains have also been great; we have been enriched through our own loss. It has been necessary to keep our judges fully exposed to all kinds of new experience, to give them time and opportunity to see their way into the problems. Any impartial critic should freely concede that they have responded remarkably well. Specific solution in restitution cases are still, on the whole, both ingenious and sensible. It is only when one tries to string them together that one becomes confused. The want of system has one general effect, that restitutionary doctrines and remedies are not marked off and confined to any particular class of cases. Some marking off might perhaps be implied from the limited scope of the Restitution Restatement, but the arrangement of the Restatements was for the convenience of the restaters. *Modern restitutionary remedies are chiefly employed for the unwinding of contracts, on all the grounds for which contracts can be unwound.* But they are not confined to contracts, or gifts, or wills, or decedent's estates, or the legal and equitable wrongs. Problems of restitution can arise in any field. Our practice in analysis and cross-citation of cases does not make any one exempt. The remedies ac-

comply with different things, their grounds are not quite uniform, but there is nothing in our present conceptions that prevents an appropriate unjust enrichment remedy from being used in any field. (pp. 111-113.) (Emphasis added.) * * *

“However they may be classified, restitutionary remedies deserve a large place in any discussion of our modern law of contracts. *Many contracts, like some people, take on a very different aspect when viewed, not from the front but from the rear.* This is especially true of lopsided contracts, where we are far from a total view. *The particular contribution of restitution remedies is that they raise directly some questions of fairness that standard contract doctrines disguise.* (pp. 114-115.) (Emphasis added.)

“My own conclusion is that restitution remedies in our law have a roving commission. The generalizations now built around them and the techniques they provide have implications that reach in every direction, in unsuspected ways. No area is marked off as exempt. We have not yet absorbed all the contributions they have made or foreseen those still in the making.” (p. 117.)

The doctrine is rapidly expanding under the realistic and practical approach to the law by enlightened courts, and in recent years the doctrine has been invoked and applied to achieve substantial justice in cases where, under narrow concepts, justice was denied. (*American LaFrance F. E. Co. v. Borough of Shenandoah*, 3 Cir. 1940, 115 F. 2d 866; *Stanley v. Columbia Broadcasting Co.*, 1949, 35 Cal. 2d 653,

208 P. 2d 9; *Lazzarevich v. Lazzarevich*, 194....., 88 Cal. App. 2d 708, 200 P. 2d 49.)

A reconsideration and appraisal of the evidence in the record will convince this court that the trial court soundly exercised its fact-finding function in allowing the offset in favor of appellees under the doctrine of quasi contract.

The written contract under which appellees bought patented articles manufactured by the appellant in Massachusetts and resold them to customers in western territory (T 5-10) contained the following provision respecting termination of the contract (T 7):

“This agreement shall continue in force until terminated by either party, but may be terminated by either party upon sixty days’ written notice given by the ordinary mail to the last known address of the other party. At the termination of this contract, Montgomery agrees to return to Fenwal all samples, papers, price lists or belongings of Fenwal which may be in the possession of Montgomery at the time and an active list of purchasers of switches.”

There was no provision in the written contract specifically charting the course to be followed or regulating the business relations and transaction of the parties in the interval that would elapse between any notice of termination and termination of the contract, or regulating problems that would arise upon or after such termination. The contract provided, however, that during its life the appellees should use their “best efforts” to obtain orders for the patented arti-

cles and pay traveling and other expenses, and that "Montgomery will purchase from Fenwal and at all times carry in stock reasonable quantities of the various types of switches produced by Fenwal in order to be in a position to make prompt shipment of the same to Montgomery's customers". (T 6.)

In the normal functioning of the contract appellees would make a sale of the patented articles to a customer at list prices established by appellant, and appellant would uniformly accept a corresponding order from appellees, ship the articles to the customer, and bill appellees therefor at discount prices stipulated in the written contract. (T 90-91, 206, 209, 211.) There was complete tolerance and cooperation between the parties arising out of rejected material, changes in requirements, changes in technical specifications, delivery dates, and other problems and service attending sales by appellees to the aircraft companies composing their customers. (T 110, 327-329.)

Under date of December 29, 1948, appellant gave appellees notice of termination of the contract as follows (T 96-97):

"This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty (60) days after the receipt by you of this letter. We believe that it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone but we shall be

glad to confer with you about this if you feel that it is desirable that we do so."

This was received by appellees on December 31, 1948. (T. 97.) A fair inference from the record is that it was prompted by the fact that appellant contemplated opening a branch office in Los Angeles (T 111) where appellees also maintained a branch office (T 314-315) and where many of their customers were located (T 318-320). In their reply to the letter of December 29, 1948, appellees stated on January 7, 1949 (T 99-100):

"Third, you are acting within the terms of our Sales Agreement in terminating same as you have elected to do. However, we will expect you to accept all orders that we place with you until the date of termination of the before-mentioned Sales Agreement regardless of the release schedules and the date of actual shipments as called for in our purchase orders. Further, on all our orders now at the factory and all orders placed prior to the termination date, we expect shipments to be made and go forward in accordance with shipping instructions."

Appellant thereupon sent its vice president John M. Storkerson to San Francisco, with plenary authority to work out with appellees "a mutually satisfactory plan for handling the problems which are involved in the termination of our business relationship". (T. 106.) In a letter dated January 20, 1949, and which Storkerson delivered to appellees

at San Francisco on January 24, 1949 (T 107-108), appellant stated (T 105):

“We note that you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of the release schedules and dates of shipments, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. We expect to fill orders which have been accepted by us or may later be accepted by us, provided you carry out your part of the contract. It seems likely that the filling of these orders will involve an adjustment of the discount or commission allowed to you, but we shall not try to discuss details in this letter. It is our desire that the termination of our contract should be carried out as smoothly and as pleasantly as is possible to all concerned. We cannot be required to accept orders given to us by you or by anyone else.”

In their negotiations with Storkerson at San Francisco on January 24 and 25, 1949, the appellees insisted that in accordance with normal procedure and the normal functioning of the contract they were entitled to full profits on all orders submitted to appellant during the 60-day period regardless of dates of shipment, and that they were able and willing to assume the servicing of such orders. (T 343.) A “mutual satisfactory plan” was worked out at San Francisco, whereby appellees were to receive a new con-

tract or a reinstatement of the old one with the territory of Southern California excluded or deleted, and whereby appellees were to forego 50% of their profits during the 60-day period. (T 343-345.) Pursuant to the "mutually satisfactory plan" one of the appellees accompanied Storkerson to Los Angeles where, on January 27 and 28, 1949, they conferred with the various aircraft companies who were customers of appellees and instructed them to freely place their orders with appellees up to March 1, 1949, and with the factory branch of the appellant in Los Angeles after March 1, 1949. (T 348-349.)

It was the expressed intention of Storkerson at these Los Angeles conferences that appellees should follow the normal procedure during the 60-day period in obtaining orders. (T 216.) Long before such conferences, however, Storkerson's principal, the appellant, had secretly decided that it would not follow normal procedure or the normal functioning of the contract in filling orders obtained by appellees during the 60-day period, but would keep them in abeyance and accept or refuse them as and when it saw fit. (T 216.) The result is obvious. On representations that normal procedure would be followed during the 60-day period, appellant's representative Storkerson induced appellees to obtain orders, to expend time and money, and to commit themselves to their customers at a time when Storkerson's principal, the appellant, had secretly abrogated normal procedure and normal function of the contract and had secretly repu-

diated responsibility for accepting or filling any order thus obtained by appellees. Stripped of all pretense, the position taken by appellant was that during the 60-day period it could hold in abeyance any order obtained by appellees and that appellees would be foreclosed of any claim for profits if it dealt directly with appellees' customers and filled the order after the expiration of the 60-day period.

Given the foregoing situation, a trial judge, seeking to attain justice, would experience no difficulty in finding that neither appellant nor its representative exercised good faith during the working out of a "mutually satisfactory agreement" with appellees. Nor would such trial judge experience difficulty in finding that lack of good faith on the part of appellant and its representative confirmed by later developments.

Between February 7, and 14, 1949, appellees received two proposed contracts from appellant in purported "confirmation of the negotiations between your company, and our Mr. J. M. Storkerson". (T 122.) One had reference to "the basis for handling the mechanics of cancellation". (T 122-124.) The other had reference to the new contract with Southern California territory excluded. (T 127-133.) They were not in accord with the negotiations between Storkerson and appellees and did not conform to the "mutually satisfactory plan" in which the negotiations culminated. In letters dated February 14 and 16, 1949, appellees

pointed out to appellant wherein they should be modified to attain such conformity. (T 134-139, 141-142.)

On February 7, 1949, appellees received from appellant a bill for January invoices. (T 363.) It bore the notation: "Terms 1/10. N/30". This meant 1% discount in 10 days, and net in 30 days, and that interest would be charged after 30 days. (T 147.) The contract between the parties contained no provision as to the time or manner for paying bills. A fair inference from the record is that such provision was omitted from the contract because appellees had established a line of credit with appellant as early, at least, as 1941. (T 120.) In the past, there were times when appellant was heavily indebted to appellees. (T 150-154.) There was a time when appellant did not bill appellees for three months. (T 150-154.) For their own convenience and profit appellees usually paid appellant by the 10th of the month in which a bill was received (T 150-154), but they were not contractually obligated to do so.

Under date of February 21, 1949, appellant inquired concerning payment of the January bill. (T 145.) Appellees replied that they preferred withholding payment until future relations were established as indicated in their letters, that is, according to the "mutually satisfactory plan". (T 172.) Telegrams were exchanged between the parties resulting in a telegram from appellant to appellees on March 2, 1949, stating that all contracts of appellees with appellant had been canceled. (T 174-184.) This was fol-

lowed by a letter dated March 3, 1949, in which appellant listed canceled and *unaccepted* orders. (T. 185-189.) *The unaccepted orders covered all orders that appellees had obtained from their customers during the 60-day period in which deliveries were to be made after expiration of the 60-day period.* (T 302.) This court was in error in its opinion (p. 3) when it said that "on March 3, 1949, Fenwal *cancelled* the undelivered orders". (Emphasis added.) The fact is that appellant never accepted orders that called for delivery after the 60-day period. This, as previously mentioned, was contrary to normal procedure and normal functioning of the contract.

Given the foregoing facts, a trial judge would experience no difficulty in finding that appellant's acts and conduct respecting the unpaid January bill indicated bad faith on its part. He could competently find that when appellant began exhibiting apparent concern over the bill it had all the facts before it showing that the contracts it had proposed did not conform to or confirm the "mutually satisfactory plan" whereunder appellees had obtained orders from their customers during the 60-day period. He could competently find that before appellant began exhibiting that apparent concern it had decided to appropriate the benefits of the orders appellees had obtained from their customers during the 60-day period and to deal directly with such customers after the 60-day period had expired. He could competently find that the apparent concern over the January bill was

designed to accomplish that end. Questions of intent, motive, and design were peculiarly within his fact-finding function to determine. (*United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342, 70 S.Ct. 177, 179, 94 L.Ed. 150.) He could competently find that appellant's letter of March 3, 1949, confirmed appellant's lack of good faith in that it showed that such orders had never been accepted. And he could competently find that appellant's lack of good faith made it impossible for appellees to discharge their contractual obligations to the customers from whom they obtained orders during the 60-day period and inevitably caused the assignment of those orders to appellant on March 9, 1949. (T 67.)

The case was a clear one that appellant, acting in bad faith, had appropriated the benefits to which appellees were entitled under such orders. It was equally clear, under the doctrine of quasi contract or unjust enrichment, that appellant was not entitled to those benefits. There was no doubt as to the amount to which appellees were entitled, for the parties stipulated that "the amount to which defendant and cross-complainant, Montgomery Brothers, would be entitled if profit were allowed on all orders is \$36,525.20, less profit on such orders as may be cancelled by the purchaser". The trial judge rendered a sound and just judgment in allowing appellees an offset in that amount against the claim asserted by appellant.

Wherefore your petitioners respectfully pray that the reversal of the judgment herein is a miscarriage

of justice, and a rehearing should be granted and the judgment affirmed.

Dated, San Francisco,
January 21, 1952.

CHARLES A. CHRISTIN,
WALLACE W. SCALES,
*Attorneys for Appellees
and Petitioners.*

CERTIFICATE OF COUNSEL.

The undersigned, one of the counsel for appellees and petitioners in the above entitled cause, hereby certifies in his judgment the foregoing petition for a rehearing is well founded, both in law and fact, and that it is not interposed for delay.

Dated, San Francisco,
January 21, 1952.

CHARLES A. CHRISTIN,
*Counsel for Appellees
and Petitioners.*

No. 12,777

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FENWAL, INCORPORATED
(a corporation),

Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY, and MONTGOMERY
BROTHERS, a partnership,

Appellees.

MOTION TO STAY MANDATE.

*To the Honorable United States Court of Appeals for
the Ninth Circuit:*

The appellees, W. Ray Montgomery, Frederick H. Montgomery, and Montgomery Brothers, a partnership, hereby respectfully move this Court, in the event that their Petition for a Rehearing be denied, for an order staying the issuance of the mandate in said cause for a period of thirty (30) days after denial of said Petition, in order to allow appellees to prepare and file a Petition for Writ of Certiorari in the office

of the Clerk of the Supreme Court of the United States, and thereafter, until such time as the said Petition for Writ of Certiorari may be granted or denied and, if granted, until the final determination of the cause.

Dated, San Francisco,
January 21, 1952.

CHARLES A. CHRISTIN,
WALLACE W. SCALES,
Attorneys for Appellees.

No. 12,781

IN THE

United States Court of Appeals
For the Ninth Circuit

THOMAS HENRY BURGTORF,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

CLARENCE E. RUST,

5837 San Pablo Avenue, Oakland 8, California,

Attorney for Appellant.

FILED

MAR 27 1951

PAUL F. O'BRIEN,

CLERK

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No. 12,781

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THOMAS HENRY BURGTORF,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

The trial Court had jurisdiction under an indictment charging violation of the following section:

Section 12, Selective Service Act of 1948, Title 28 United States Code, Section 1291 and Rule 37(a) Federal Rules of Criminal Procedure.

This Court has jurisdiction under Section 128(a) of the Judicial Code as amended by Act of February 15, 1925. (28 U.S.C.A. 225.)

STATEMENT OF THE CASE.

Thomas Henry Burgtorf, the appellant, was indicted by the Grand Jury for the Northern District

of California, Southern Division. The indictment charged appellant with a violation of the "Selective Service Act of 1948", in that he failed to submit to induction into the Land or Naval Forces of the United States. (R. 159.)

To the indictment in question the appealing defendant entered a plea of not guilty. (R. 166.)

The appellant was found guilty of the charge contained in the indictment and was sentenced by the trial Court to imprisonment in the U. S. Penitentiary for a period of five years (R. 169), being the longest sentence ever imposed in the District upon a religious objector.

At the conclusion of the government's case in chief, appellant moved the Court for a dismissal of the indictment on the ground that the evidence was insufficient as a matter of law to sustain a conviction, which motion was denied. (R. 83.) At the conclusion of defendant's case and all of the testimony, appellant renewed his motion to dismiss on the same ground, which motion was denied. (R. 134.)

After the decision and sentence as herein stated, the appellant duly filed a notice of appeal (R. 170) and thereafter duly filed his designation of the record to be used on appeal.

SUMMARY OF THE EVIDENCE.

Appellant is a religious objector to war and participation in war in any form. (R. 20 and 57 and 91

to 95.) He is a minister of the society of Jehovah's Witnesses and considers that to voluntarily enter the armed forces would make him a traitor to God. (R. 79.)

When he filed his questionnaire with the Draft Board he indicated in his answers that he was a minister and claimed exemption as such. (R. 57.) He neglected or overlooked the fact that he should have filed supporting evidence of his claim. (R. 57.)

On October 1, 1948, the Draft Board classified him as 1-A. (R. 11.) An entry was then made in the record of the Draft Board indicating that a notice of the classification was mailed to appellant. (R. 11.) The clerk had no independent recollection of having actually mailed the notice. (R. 39 and 41.) Appellant consistently denied that he ever received the notice. When he got the notice to report for a physical examination (which would be the first word from the Board after classification), he complained that he had not received any classification notice. (R. 41.) He appeared before the Board and made the same complaint. (R. 58.) And again to the F.B.I. agent. (R. 55.) He testified unequivocally that he did not receive such notice. (R. 84 and 85.)

A registrant has but 10 days to appeal from his classification, after notice. (R. 12.) When he got the notice to take a physical examination he went to the Draft Board and claimed he had not received any notice and sought to appeal. (R. 12.) The Board granted appellant an appearance before it "with the understanding that it would not necessarily reopen

his case". (R. 14.) The minutes of that meeting shows: "Mr. Burgtorf appeared before the Board and was advised by the Board that since he had not appealed within his appeal period *they were not re-opening* his case but would let him present any information he wanted." (R. 15.) He gave certain oral testimony (R. 15) and presented certain documents. (R. 43.) After the hearing the Board advised appellant that "his case had not been reopened; therefore he wasn't entitled to an appeal". (R. 16 and 17.) No new notice of classification after hearing was mailed. (R. 88.)

Thereafter the State office of Selective Service wrote the Local Board a letter advising the Board to permit an appeal and to advise appellant that he could attach additional matter to the file to be sent to the Appeal Board. (R. 22 to 24.) Appellant did submit additional documents. (R. 24.)

The file was then sent to the Appeal Board. (R. 25 and 27.) This Appeal Board affirmed the 1-A classification. (R. 30.) Appellant was sent an order to report for induction. (R. 35.) He so reported (R. 36) but refused to be inducted. (R. 53.) He was subsequently indicted for such refusal and in a trial before the Court, without a jury, he was convicted and sentenced to five years in prison.

SPECIFICATION OF ERRORS RELIED UPON.

The Court erred in denying the motion of defendant for a dismissal of the indictment on the ground that the evidence was insufficient as a matter of law to sustain the conviction, made at the conclusion of the testimony on behalf of the United States and renewed at the conclusion of all the evidence (R. 83 and 134) for the following reasons:

1. There was a failure of due process before the Draft Board;

2. There was no evidence to support the classification by the Draft Board and none to support the conviction.

ARGUMENT.

There was a clear failure of due process within the administrative agency, namely, the Draft Board and the Appeal Board. Due process within such an agency requires that those administering it follow strictly the regulations and that the registrant be accorded all the rights provided for by those regulations—otherwise there is no due process.

St. Joseph Stockyards Co. v. U. S., 298 U.S.

38, 56 S. Ct. 720, 80 L. Ed. 1033;

Yamataga v. Fisher, 189 U.S. 86, 23 S. Ct. 611,

47 L. Ed. 721;

U. S. v. Laier, 52 F. Supp. 392;

U. S. v. Peterson, 53 F. Supp. 760.

Through no fault of his own the appellant lost all the substantial rights to which he was entitled under

the Selective Service Act and Regulations. These require: (1) Classification by the Board (Regulation 1623.1); (2) mailing of a notice of such classification to registrant (Regulation 1623.4(b)); right to receive an open hearing before the Board and to be again classified after such hearing (Regulation 1625.2); right to appeal such final classification (Regulation 1626.2).

Registrant lost all these substantial rights through failure to receive his notice of classification. That he did not receive this classification must stand as proved. His testimony was, categorically, that he did not get the notice. (R. 84.) The only testimony in opposition was that of the clerk of the Board, who had no independent recollection of mailing it, but who thought she must have because there was an entry in the record that it was mailed. (R. 39 and 41.)

Mere "negative" testimony will not overcome positive, affirmative evidence.

Canion v. S. P. Co., 80 Pac. (2d) 397 (Ariz.).

The pretended hearing by the Board in which it indicated at the very beginning that it was not "re-opening" his case, did not in the slightest rectify that situation. (R. 15.) At this so-called "hearing" he was permitted to come and bring his evidence and submit it but with the understanding that the Board would not do anything about it. Obviously, this is not a "hearing" in any legal sense. The result was that at no time did the local Board (the fact-finding body) ever pass on his evidence.

The sham was further pursued by the procedure after the hearing when appellant was advised to attach whatever evidence he wished to the file and it would be sent to the Appeal Board. (R. 22-24.) Here we have a situation where a case comes before the Appeal Board pre-judged by the fact-finding body without that body ever passing on the evidence. The California District Court of Appeal (2nd Dist.) once said that a judge not only ought to be fair, but he ought to *appear* to be fair. *Rosenfield v. Vasper*, 45 C.A. (2d) 365. Certainly nothing *appears* more unfair than the procedure followed here. It was a sham and a mockery and a blatant denial of due process under the authorities cited. Such being the case, there is nothing to support the judgment of conviction.

The judgment must fall for another reason. There is no evidence to support the Draft Board's action in classifying defendant as 1-A.

He claimed as a minister in his questionnaire. (R. 8-9.) Declared that he had been formally ordained as a minister on June 10, 1942 by an ecclesiastical official authorized to perform ordination for the religious society of which he was a member (R. 9.) and that he regularly served as a minister. There was no other evidence before the Board except some evidence as to his secular employment. On this record the Board denied his claim as a minister and classified him 1-A. (R. 11.)

Defendant then presented further evidence in form of affidavits which further confirmed his ministry

(R. 89-95) and set forth, rather fully, his beliefs and activities as a minister, as well as indicating his ordination as a minister.

None of this evidence was contradicted. There was therefore no evidence before the Board which justified its denying his claim as a minister.

Where there is no evidence to support the classification given by the Board, its action must be considered arbitrary and ineffective and its decision will be set aside by the Court.

Cox v. United States, 332 U.S. 442, 68 S. Ct. 115;

Niznik v. United States, 173 F. (2d) 328;

Niznik v. United States, 184 F. (2d) 972.

The decision of the Draft Board appears to rest more upon prejudice than upon evidentiary facts. Nor is this element entirely lacking in the decision of the Court, as witness the almost reckless finding "that the matter of the defendant's testimony that he did not receive any notice is a pure afterthought"—with no evidence whatever to support it.

There has been a general failure of due process throughout the whole proceedings.

Estep v. United States, 327 U.S. 114, 66 S. Ct. 423;

Smith v. United States, 157 Fed. (2d) 176 (4th Cir.);

United States v. Zieber, 161 Fed. (2d) 90 (3rd Cir.).

It is respectfully submitted that the motion to dismiss should have been granted and that the conviction should be reversed.

Dated, Oakland, California,
March 26, 1951.

CLARENCE E. RUST,
Attorney for Appellant.

No. 12,781

IN THE

United States Court of Appeals
For the Ninth Circuit

THOMAS HENRY BURGTORF,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	

BRIEF FOR APPELLEE.

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FILED

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PAUL A. D'HHIEN,
CLERK

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No. 12,781

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THOMAS HENRY BURGTORF,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of the United States District Court for the Northern District of California, convicting the appellant, after a trial without a jury, of a violation of Section 12 of the Selective Service Act of 1948, Title 50 U.S.C. War Appendix, Section 462(a). Jurisdiction to review the judgment of conviction is conferred upon this Honorable Court by the provisions of Title 28 U.S.C. Section

STATEMENT OF THE CASE.

The appellant was indicted in the United States District Court for the Northern District of California for a violation of Section 12 of the Selective Service Act of 1948, refusal to submit to induction and be inducted into the Armed Forces of the United States. After a trial, without a jury, the appellant was adjudged guilty and sentenced to imprisonment for a period of five years. (Tr. 169.) The Grand Jury charged the appellant in the indictment, which it returned against him, as follows:

“THOMAS HENRY BURGTORF,

defendant herein, being a male citizen of the United States of the age of 23 years at the time fixed for registration, residing in the United States and under the duty to present himself for and submit to registration under the provision of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the ‘Selective Service Act of 1948’, and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 58 of the Selective Service System in the City and County of San Mateo, State of California, which said Local Board No. 58 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 28th day of September, 1950, in the City and County of San Francisco, State and Northern District of California knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in

Class 1-A and having theretofore been duly ordered by his said Local Board No. 58 to report at San Francisco, California on the 28th day of September, 1950, for induction into the Armed Forces of the United States, and having so reported, did then and there knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States, as provided in the said Selective Service Act of 1948, and the rules and regulations made pursuant thereto." (Tr. 159-160.)

THE SELECTIVE SERVICE ACT OF 1948.

Section 12 of the Selective Service Act of 1948, Title 50 U.S.C. War Appendix, Section 462(a), reads in pertinent part as follows:

"* * * any person * * * who shall knowingly fail or neglect or refuse to perform any duty required of him under * * * rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine not more than \$10,000, or by both such fine and imprisonment * * *. No person shall be tried by court martial in any case arising under this title unless such person has actually been inducted for the training and service prescribed under this title * * *."

Section 4 of the Selective Service Act of 1948, Title 50 U.S.C. War Appendix, Section 454, reads in pertinent part as follows:

“(a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six, the time fixed for registration * * *, shall be liable for training and service in the Armed Forces of the United States.”

PERTINENT REGULATIONS.

Part 1622.5 Selective Service Regulations reads as follows:

“Class I-A: Available for Military Service—
 (a) In Class I-A shall be placed every registrant who is not eligible for classification in Class I-C* and has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class.”

The other applicable regulations are set forth in the Appendix to this brief.

FACTS OF THE CASE.

The appellant, a citizen of the United States, born March 28, 1925, a registrant of Local Board No. 58, San Mateo, California, filed his completed questionnaire with the said Board on September 28, 1948

*“Class I-C Member of the Armed Forces of the United States, the Coast Guard, the Coast and Geodetic Survey, or the Public Health Service, and certain registrants separated therefrom.” Part 1622.7, Selective Service Regulations.

(U. S. Exh. 2, Tr. 7-10). In the questionnaire, in which appellant requested that he be classified in Class IV-D, but made no claim that he was a conscientious objector, he stated, among other things, that he was single, that he was a minister of religion, regularly serving as such, a minister of Jehovah's Witnesses since June 10, 1942, having been formally ordained on that date by an ecclesiastical official, a Watchtower representative. No documents were attached to the questionnaire filed therewith to support the claim made by the appellant that he was a minister. The appellant also indicated in his questionnaire that he was employed 40 hours a week at an average wage of \$1.37 an hour by a manufacturer of conveyor equipment, that his work consisted of punching axle holes for conveyor equipment, and that he had entered upon such employment in August of 1947. According to the record of entries of the actions of the Local Board as reflected on the back of the questionnaire, appellant on October 1, 1948, was classified by the said Board in Class I-A by a vote of four to nothing, and on October 8, 1948, a notice of such classification, Form 110, was mailed to him; on October 25, 1948, appellant was mailed an order to report for Armed Forces physical examination (Tr. 11-12), reported for his physical examination as ordered on November 5, 1948 (U. S. Exh. 3), was found acceptable for service in the Armed Forces, and on November 12, 1948, was mailed a notice to that effect, N.M.E. Form 62 (U. S. Exh. 4, Tr. 13-14). On November 10, 1948, some 20 days after time to appeal had expired, the Local Board

received from the appellant a letter requesting an appeal from the I-A Classification accorded him by the said Board, to which were attached two supporting documents (U. S. Exh. 4, Tr. 12-13). Appellant claimed he did not file his appeal within the period required, ten days from the date the notice of classification was mailed him, because he had never received the said notice, although the records of the Board reflect that the notice of classification was never returned to it by the postmaster (Tr. 12-13). It is undisputed that the appellant received all other mail addressed to him by his Local Board. It is also undisputed that the appellant made no timely request for a personal appearance before the Local Board, either orally or in writing. Thereafter, according to the testimony of the clerk, it was suggested by her to the appellant that he present himself before the Local Board, such suggestion being coupled with an admonition by her that such an appearance would not necessarily constitute a reopening of his case (Tr. 70-71). On December 9, 1948, appellant did present himself and the following proceedings occurred, as indicated by the written record which is a part of appellant's Selective Service file:

“Mr. Burgtorf appeared before the Board and was advised by the Board that since he had not appealed within his appeal period they were not reopening his case but would let him present any information he wanted. He stated he was a student and also a minister of religion. Also that in the event he was not considered a minister he had religious objections, he believes in neutralism in

politics and religion. Objects to taking part in war of any kind but that is not what he wants, he is pressing for ministerial deferment. Board quoted section of regulations governing ministers and said they did not believe that any information he had presented would warrant reopening his classification." (U. S. Exh. 5, Tr. 15-16.)

The records of the Board also reflect that on that date, by a vote of four to nothing, its members refused to reopen appellant's case and by letter dated December 10, 1948 advised the appellant of such action and also advised him that he was not entitled to take an appeal because his letter of appeal had not been timely filed. (T. 16-17.) On January 5, 1949 appellant was sent an order to report for induction on January 17, 1949 (U. S. Exh. 6, Tr. 18), appeared at the induction station and refused to submit to induction. (U. S. Exh. 7, Tr. 19-20.) On January 18, 1949 the Local Board advised the appellant that at the request of State Headquarters of Selective Service¹ he would be permitted to appeal his I-A Classification, and in addition was granted five days within which to file any supplemental material for forwarding to the Board of Appeal (U. S. Exh. 8, Tr. 21-22), and the United States Attorney was advised of such action. (Tr. 26.) The appellant submitted certain supplementary documents which, together with his original appeal letter (U. S. Exh. 10, Tr. 25) and his complete file, were forwarded to the appropriate Board of Ap-

¹The request to the Board was by letter. (U. S. Exh. 9, Tr. 22-24.) For purpose of convenience the letter is also set forth in full in the Appendix to this Brief.

peal on January 25, 1949. (Tr. 26.) Thereafter and on March 10, 1949 the Appeal Board, by a vote of four to nothing, sustained the action of the Local Board, and on April 8, 1949 the appellant was mailed appropriate notice advising him of the decision of the Appeal Board. (Tr. 30-31.)

No further action was taken with reference to the appellant until August 15, 1950 when he was sent an order to report for another Armed Forces physical examination on August 29, 1950, with which order he complied. (Tr. 34.) Appellant likewise passed this examination and a notice to this effect was mailed to him on September 5, 1950. (Tr. 34-35.) Once more, and on September 28, 1950, in compliance with another order to report for induction mailed him September 15, 1950 (U. S. Exh. 18, Tr. 35-36), appellant appeared at the induction station in San Francisco and refused to submit himself to induction and be inducted into the Armed Forces of the United States. (Tr. 60-64, 77-80, 81-83.) It was this refusal which resulted in his indictment and conviction. From this judgment of conviction appellant now appeals to this Honorable Court. (Tr. 170.)

CONTENTIONS OF APPELLANT.

The appellant contends in substance that

(1) he was denied due process before his Local Draft Board,
and that

(2) he was arbitrarily classified in Class I-A, and accordingly he was under no obligation to submit to induction since the induction order was based on a void classification and the evidence before the trial Court, therefore, was insufficient to sustain his conviction.

ARGUMENT.

Appellee begins this argument by reference to the case of *United States v. Jones*, 176 F. (2d) 278, wherein this Honorable Court said, at page 282:

“* * *. At the same time, presumption of legality attaches to the act of a public officer. As Chief Justice Marshall put it in an old case, an act done by an officer authorized by law to perform it ‘carries with it prima facie evidence that it is within his power’ and ‘he who alleges that an officer intrusted with an important duty has violated his instructions must show it’. *Delassus v. United States*, 1835, 9 Peters 117, 134, 9 L. Ed. 71. And see, *United States v. Coe*, 1898, 170 U. S. 681, 696-697, 18 S. Ct. 745, 42 L. Ed. 1195; *Lamport Mfg. Supply Co. v. United States*, 1928, 65 Ct. Cl. 579, 610.”

I. THE ALLEGED DENIAL OF DUE PROCESS.

Basis of the allegation by the appellant that he was denied due process by his Local Draft Board is a claimed deprivation to him of a personal appearance, with the attendant reopening of his classification.

Does the claimed deprivation of a personal appearance void all subsequent actions of the Local Board and the Appeal Board, as was held in *United States v. Laier*, (D.C.N.D. Cal.), 52 F. Supp. 392, cited by appellant in his opening brief? Appellee feels no need to discuss this proposition, conceding it arguendo, except to point out that certainly an Appeal Board finding would cure any lack of due process before the Local Board, since the evidence is overwhelming, as the trial Court found, that there was no deprivation of a personal appearance in our case at bar. (Tr. 154.)

The regulations require that a request for personal appearance be made in writing. (See Appendix, Part 624.1, Selective Service Regulations.) No such written request was made by the appellant.

The regulations further require that a request for personal appearance, after classification, be made in writing within ten days after the mailing of written notice of such classification. (See Appendix, Part 624.1, Selective Service Regulations.) No such timely request was made. Appellant denies the receipt of the original I-A Classification Card, SSS Form 110,² but the Court found otherwise. In this connection, in adjudging the appellant guilty, the Court stated:

“The evidence has been presented extensively, the argument is concluded. I believe the due

²It is significant that the I-A Card contained instructions with reference to the time when an appeal must be taken and the manner and period within which a request for personal appearance must be made.

process clause has been fully met and complied with, and the evidence is abundant, not only from the clerical records, but from the oral testimony, that all of the procedural steps and technique were carried out, and that notice was received by the defendant. It might well be, and I think it is probably inferable, that the matter of the defendant's testimony that he did not receive any notice is a pure afterthought." (Tr. 154.)

It should be noted that the entry on the back of the questionnaire reflected the mailing of the notice of classification and such notice was not returned by the Postmaster to the Local Board. Significant it is, that all other orders and notices mailed appellant were received by him. Appellant argues that the clerk had no independent recollection of the mailing of the I-A Card and, accordingly, this is conclusive evidence that such notice was not mailed or that the appellant did not receive the same. To require independent knowledge of the mailing of each notice in order to bind a registrant would be to create a situation making the enforcement of the Selective Service Act virtually impossible. Appellee wonders, therefore, whether appellant is seriously pressing this contention. The law with reference to this subject is well settled. Here, entries of the mailing of notices are kept in the regular course of business; the custodian of those records is certainly competent to testify concerning their mailing, and the foundation is sufficient for the admissibility of such testimony, as well as for the introduction of copies of documents which the record en-

tries show were mailed and about which there is no dispute. But, assuming that the appellant's testimony is believed that he did not receive the original I-A Card mailed him on October 8, 1948 and accordingly he could not file the request for personal appearance within the ten-day period required, the fact remains that he did personally receive from the clerk on November 5, 1948 a duplicate of this original card (Tr. 105-107) and failed to file a written request for personal appearance within ten days from that latter date. Furthermore, it is difficult to understand why appellant, when he received his notice for physical examination mailed him on or about October 25, 1948 and was thereby put on notice that he had been classified in Class I-A, did not consult the clerk of the Board with reference to his case until November 5, 1948. (Tr. 105-106.) Appellant pleads ignorance of Selective Service Regulations (Tr. 106) even though such ignorance is no excuse, but appellee questions such a claim in view of the testimony of appellant, under cross-examination, disclosing a present and long-time familiarity with the Selective Service Act, its rules and regulations, and the case law applicable thereto. (Tr. 97-100.) Be this as it may, the finding of the Court, hereinabove set out, is supported by substantial evidence and should not be disturbed. The appellant was not entitled to a personal appearance or to have his classification considered anew by the Local Board.³ He was not denied due process by his

³See Appendix to this Brief, Parts 625.1 and 625.2, Selective Service Regulations.

Local Draft Board. As a matter of fact, the appellant was accorded greater rights than due process demanded, when prosecution for his original violation of the statute was dropped and he was permitted to take an untimely appeal⁴ from his I-A Classification. Such consideration would never have been shown him⁵ had the Government authorities anticipated his future course of conduct, and known that, under cross-examination, the appellant would have conducted himself and spoken in the arrogant manner in which he did, as the following will indicate:

“Q. (By Mr. Karesh) Now, you’re still not willing to be inducted into the Army?

A. That is for sure.

Q. You know the consequences of your act?

A. I am fully aware of the consequences.

Q. You said something about your being a traitor to the Almighty if you obey that order?

A. That is correct.

Q. You still stand by that?

A. I stand on that 100 per cent.

Q. What do you mean, ‘a traitor to the Almighty’?

A. I don’t think the Almighty God has any part in these wars by selfish men of this world who hold life a cheap garment, so my life would

⁴See Appendix to this Brief, Part 1626.2, Selective Service Regulations.

⁵In this regard in his closing argument the prosecutor said, among other things:

“May it please your Honor, I frankly believe and am firmly convinced that the office of United States Attorney owes to the Selective Service Board an apology, because as the record will show, it was at our request that this Board very graciously permitted this case to go to the Appeal Board.” (Tr. 143.)

be lost with only selfish attainments. It would be a disgrace to our Almighty, therefore, even for a Chaplain in the Army putting his blessing on a set-up like that.

Q. You don't approve of Chaplains, either?

A. No.

Q. What do you say about them?

A. It is a disgrace to the Almighty to take his name in vain by applying it to something that is doomed to destruction in the old world system of things.

Q. You live here in America and enjoy living here?

A. Well, actually I am a free moral agent created by the Almighty, and my conscience is in accordance with the will of God. No external authority has any right to come in between. I can only say like the Apostle Paul, no authority nor government nor anything else shall separate us from the love of God and Christ.

Q. You consider, do you, Chaplains traitors to God, is that right?

A. I certainly do." (Tr. 120-121.)

In his opening brief, at page 7, appellant states, among other things: "Certainly nothing *appears* more unfair than the procedure followed here. It was a sham and a mockery and a blatant denial of due process under the authorities cited." In view of the record herein, such a statement can be called nothing more than a distortion of the facts and the law applicable thereto, for that record is a complete answer to the unwarranted and unsupported claim of an alleged deprivation of due process.

II. THE ALLEGED ARBITRARY ACTIONS OF THE LOCAL AND APPEAL BOARDS.

Appellant contends that in classifying him in Class I-A and in refusing to classify him as a minister of religion in Class IV-D (exemption from service of any kind, either military or civil), his Local Board and his Appeal Board acted arbitrarily and capriciously, inasmuch as there was no evidence to sustain such actions.

In *Estep v. United States*, 327 U.S. 114, 122, 123, the Supreme Court declared:

“* * *. The provision making the decisions of the local boards ‘final’ means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local board was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.”

In its decision in the *Estep* case, the Supreme Court cited the case of *Goff v. United States*, 135 F. (2d) 610, 612. In this latter case, the United States Court of Appeals for the Fourth Circuit said:

“* * *. But as we said in the case of *Adrian Elwood Baxley v. United States*, 4 Cir., 134 F. 2d 998, this does not mean that the court in a

criminal proceeding may review the action of the board. *That action is to be taken as final, notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right.* Nothing in the evidence offered in the court below tended to show anything of this sort. *Adrian Elwood Baxley v. United States, supra; United States v. Kauten, 2 Cir., 133 F. 2d 703; Seele v. United States, 8 Cir., 133 F. 2d 1015; Rase v. United States, 6 Cir., 129 F. 2d 204; Johnson v. United States, 8 Cir., 126 F. 2d 242; United States v. Pace, D.C., 46 F. Supp. 316; United States v. DiLorenzo, D.C., 45 F. Supp. 590; United States v. Newman, D.C. 44 F. Supp. 817.*" (Emphasis supplied.)

A reading of the pertinent Selective Service Regulations (see Appendix, Part 1622.19), will show that the Local Board and the Appeal Board were well within their rights in denying appellant a IV-D Classification and finding him available for military service by classifying him in Class I-A. Appellant was not preaching regularly but only incidentally, his regular occupation being that of a hole puncher of conveyor equipment, a position which he occupied continuously from the time he filled out his Selective Service questionnaire until the time he wilfully disobeyed the Selective Service Act by refusing a second time to submit to induction on September 28, 1950. (Tr. 96.) In his opening brief, at page 8, appellant asserts that the "decision of the

Draft Board appears to rest more upon prejudice than upon evidentiary facts''. Here is another statement completely unsupported by the record. Appellant claims that he became a minister at the age of 17 years, a statement, which in itself would give the Draft Board justifiable cause to disregard his claim for exemption. What, in effect, appellant is seeking to do is to have the Courts hold that mere membership in Jehovah's Witnesses is a fact sufficient in itself to warrant an automatic classification of Class IV-D. That the Congress never intended such a result may, of course, be seen by reference to the Act and the rules and regulations promulgated thereunder. A member of Jehovah's Witnesses is entitled to no less, or to no greater consideration than that accorded a member of any other religious group. That such fair consideration is given them can not be questioned, except, for example, by a person, like the appellant, who, having received even greater consideration than that to which he is entitled, nonetheless, in order to justify his flagrant and wilful violation of the statute, loudly proclaimed that he was abused by his Local Draft Board and by his Appeal Board. Of all this it may be finally said that with the evidence before it the Local Board had only one decision which it could properly make, and that was its decision to classify the appellant in Class I-A, a decision which, of course, was likewise properly affirmed by the Appeal Board.

SUMMARY.

The appellant was not deprived of any of his rights before his Local Draft Board and, as a matter of fact, was accorded even greater rights than those to which he was legally entitled. Thus he was accorded due process. Furthermore, on the basis of the record there was no other decision which could properly be made by the Local Board and the Appeal Board than their decision that the appellant was entitled to no classification except Class I-A. Accordingly, instead of the actions of the Draft Board and the Appeal Board being arbitrary and capricious, they were fair and just, being based upon substantial evidence.

Thus the I-A Classification being valid, the Induction Order based thereon was likewise valid, and the refusal to submit to induction by the appellant constituted a wilful violation of the Selective Service Act of 1948.

The evidence, therefore, was more than sufficient to justify the conviction of the appellant.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the judgment of conviction was correct and should be affirmed.

Dated, San Francisco, California,
May 9, 1951.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

I.

SELECTIVE SERVICE REGULATIONS.

“CLASS IV-D: MINISTER OF RELIGION OR DIVINITY STUDENT.—(a) In Class IV-D shall be placed any registrant:

- (1) Who is a regular minister of religion;
- (2) Who is a duly ordained minister of religion;
- (3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or
- (4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of title I of the Selective Service Act of 1948 contains in part the following provisions:

‘SEC. 16. When used in this title— * * *

(g) (1) the term “duly ordained minister of religion” means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of

a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.' "

Part 1622.19.

“OPPORTUNITY TO APPEAR IN PERSON.—

(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

* * * * *

(c) If the written request of the registrant to appear in person is filed after such 10-day period and the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control, the local board shall enter in the ‘Minutes of Actions by Local Board and Appeal Board’ on the Classification Questionnaire (SSS Form No. 100) the date on which the request was received and the date and the time fixed for the registrant to appear and shall promptly mail to the registrant a notice of the time and place fixed for such appearance.

(d) If such a written request of a registrant for an opportunity to appear in person is received after the 10-day period following the mailing of a Notice of Classification (SSS Form No. 110) to the regis-

trant, the local board, unless it specifically finds that the registrant was unable to file such a request within such period because of circumstances over which he had no control, shall advise the registrant, by letter, that the time in which he is permitted to file such a request has expired, and a copy of such letter shall be placed in the registrant's file. Under such circumstances, no other record of the disposition of the registrant's request need be made."

Part 624.1.

"CLASSIFICATION NOT PERMANENT.—(a)
No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, or dependency status, or in his physical condition. Any other person should, within 10 days after knowledge thereof, report to the local board in writing any such fact.

(c) * * *."

Part 625.1.

“WHEN REGISTRANT’S CLASSIFICATION MAY BE REOPENED AND CONSIDERED ANEW.—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant’s classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant’s classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 25), unless the local board first specifically finds there has been a change in the registrant’s status resulting from circumstances over which the registrant had no control.”

Part 625.2.

“WHEN REGISTRANT’S CLASSIFICATION SHALL BE REOPENED AND CONSIDERED ANEW.—The local board shall reopen and consider anew the classification of a registrant upon the written

request of the State Director of Selective Service or the Director of Selective Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant."

Part 625.3.

“REFUSAL TO REOPEN AND CONSIDER ANEW REGISTRANT’S CLASSIFICATION.—When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant’s classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant’s classification, it shall not reopen the registrant’s classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant’s classification and shall place a copy of the letter in the registrant’s file. No other record of the receipt of such a request and the action taken thereon is required.”

Part 625.4.

“APPEAL BY DIRECTOR AND STATE DIRECTOR.—(a) Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board.

(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.’’

Part 1626.1.

“APPEAL BY REGISTRANT AND OTHERS.—

(a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant’s physical or mental condition.

(b) The government appeal agent may take any appeal authorized under paragraph (a) of this section at any time within 10 days after the date when the local board mails to the registrant a Notice of Classification (SSS Form No. 110) or at any time before the registrant is mailed an Order to Report for Induction (SSS Form No. 252).

(c) The registrant, any person who claims to be a dependent of the registrant, or any person who prior to the classification appealed from filed a written re-

quest for the current occupational deferment of the registrant, may take an appeal authorized under paragraph (a) of this section at any time within the following periods:

(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110).

(2) * * *."

Part 1626.2.

"HOW APPEAL TO APPEAL BOARD IS TAKEN.—(a) Any person entitled to do so may appeal to the appeal board by filing with the local board a written notice of appeal. Such notice need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal. The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal.

(b) The local board shall enter on the Classification Questionnaire (SSS Form No. 100), under the heading 'Minutes of Action by Local Board and Appeal Board', the date on which an appeal is filed."

Part 1626.11.

"STATEMENT OF PERSON APPEALING.—The person appealing may attach to his appeal a statement specifying the matters in which he believes the

local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

Part 1626.12.

II.

Letter from State Headquarters of Selective Service to Local Board No. 58:

"Subject: Thomas Henry Burgtorf.

Gentlemen:

This supplements our conversation today with Mrs. Anderson regarding the above-named registrant, who refused to be inducted at San Francisco.

As stated in our conversation, Mr. Karesh, the Assistant United States Attorney at San Francisco, telephoned us this morning stating that the registrant represents that he failed to receive his classification notice and that when he did report at the Board, the time for appeal had passed and that the Board would not extend the time.

Mr. Karesh was apprehensive that the case would be prejudiced by reason of the fact that the appeal had been disallowed and suggested that this headquarters discuss with the Board the question whether

the Board would be agreeable to permitting an appeal to be taken by the registrant at this time.

The matter was discussed with Mrs. Anderson and on the basis of our conversation with her, we notified Mr. Karesh that the appeal would be granted.

As suggested to Mrs. Anderson, we believe it would be advisable for the Board to write the registrant a letter telling him that the appeal had been granted and that he will have five days from the date of the letter in which to file any additional matter he wishes in his cover sheet to be considered by the Appeal Board. The suggestion in respect to the filing was made with the thought in mind that if the case subsequently reaches the prosecution stage, the registrant will not be able to say that the Board permitted him to take an appeal but would not allow him to make any further filings.

Mr. Karesh suggests that the registrant should not be carried on the Delinquent Report or reported to him as a delinquent.

For the purpose of satisfying the regulations since the registrant has been ordered to report for induction, this headquarters is agreeable to the appeal being taken.

The willingness of the Board to assist in the solution of the problem is appreciated.

FOR THE STATE DIRECTOR CHARLES F. GOING, COLONEL, JAGD, Deputy State Director."

No. 12782

United States
Court of Appeals
for the Ninth Circuit.

CONTROLLER OF THE STATE OF CALI-
FORNIA,

Appellant,

VS.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

Transcript of Record

Appeal from the District Court of the United States
Southern District of California,
Central Division.

FILED

MAY 1 1957

PAUL H. O'BRIEN.

No. 12782

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Court of Appeals
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CONTROLLER OF THE STATE OF CALI-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 44536-B

In the Matter of:

ARLIE R. LOCKWOOD,

Debtor.

PETITION UNDER CHAPTER XI (SECTION
322) OF THE BANKRUPTCY ACT

To the Honorable Judges of the Above-Entitled
Court:

The verified petition of Arlie R. Lockwood respectfully represents to the Court as follows:

I.

That your petitioner is now and at all times herein mentioned has been a resident of the State of California, County of Los Angeles, residing at 11930 Longvale Street, Lynwood, California, and has been engaged in and conducting an oil business at 8132 Atlantic Boulevard, Bell, California, and is a person entitled to become a bankrupt under the Acts of Congress relating to bankruptcy.

II.

That your petitioner has been operating a business at 8132 Atlantic Boulevard. Said business consists of the purchase of petroleum products and the sale of said products to third parties; that your petitioner has motor equipment used to effect de-

livery of said products, and has a plant and equipment for storage located upon real property leased from the Elco Oil Corporation or E. J. [2*] Lindeman. That said business is operating at a monthly profit of \$1,000.00 per month; that your petitioner's fixed overhead consists of weekly payroll of \$265.00, rent of \$150.00 per month, and your petitioner's drawing account of \$125.00 per week plus travelling expenses; that in addition, your petitioner has miscellaneous expenses of repair and maintenance of his equipment. Your petitioner represents that if permitted to remain in possession of his assets and carry on his business under the supervision of the above-entitled court, that your petitioner's operations will show approximately \$1,000.00 per month net operating profit.

III.

That no bankruptcy proceeding has heretofore been filed by your petitioner, and no involuntary petition in bankruptcy is now pending against him. That your petitioner is unable to pay his debts as they mature, and proposes the arrangement hereinafter set forth with his unsecured creditors.

IV.

That your petitioner alleges, as required by Section 324, Chapter 11 of the Bankruptcy Act, as amended:

(a) That your petitioner has no executory contracts except that your petitioner rents on a month-to-month basis the premises occupied by your petitioner, and that your petitioner has leases cover-

ing two service stations which have heretofore been subleased to the Elm Oil Company, which company is paying the rent direct to the lessors under said leases.

(b) That a statement of affairs of your petitioner will be filed within the time directed by the above-entitled Court.

(c) That the Clerk's filing fee will be paid upon the filing of this petition.

(d) That your petitioner's assets are located at 8132 Atlantic Boulevard and such other places as shown in the schedules on file herein. [3]

V.

That your petitioner's present difficulty has arisen by a proposed assessment by the State Board of Equalization whereby said Board has wrongfully claimed that your petitioner has sold gasoline without collecting and paying a tax thereon, which claim is disputed by your petitioner; but the said Board proposes to levy an assessment of \$27,000.00 in the form of a jeopardy assessment. That your petitioner is obligated to the other creditors as shown in the schedules, which creditors are current and are still selling products to your petitioner; but if said proposed jeopardy assessment is levied, it would be impossible for your petitioner to pay the same and litigate the validity thereof, and the same would prevent your petitioner's satisfying the claims of unsecured creditors or carrying on its business and preserving the good will not possessed by your petitioner in respect thereto.

VI.

That attached hereto are schedules required to be filed under the general orders of the Bankruptcy Act, which contain information as accurate as your petitioner is able to present at this time pending an up-to-date audit of petitioner's books, and will request the above-entitled Court to file amended schedules if and when it appears that the attached schedules are in error.

Debtor's Proposed Plan of Arrangement

That your petitioner proposes the following plan of arrangement:

Article 1. That the creditors of petitioner be divided into classes and that the proposed classes be as follows:

Class A. Expenses of operation under plan of arrangements as may be allowed and ordered paid.

Class B. Expenses of administration that may be allowed and ordered paid.

Class C. All creditors entitled to priority as provided [4] in Section 64a, subdivisions 2, 4 and 5 of the Acts of Congress relating to Bankruptcy, as amended.

Class D. Obligations as they mature to secured creditors in accordance with the terms of their contracts.

Class E. To pay pro-rata, at such times as this Honorable Court may direct and at intervals not to exceed six months, dividends upon unsecured creditors' claims until said claims are paid in full.

Article II. That said plan of arrangement be carried out by permitting the debtor to remain in possession of his assets with the right to carry on his business of purchasing and selling petroleum products.

Article III. That petitioner be permitted to make payments from time to time when funds are available in accordance with this plan of arrangement and that petitioner be given an extension of time within which to complete this arrangement and to discharge all of the creditors' claims as provided in this arrangement.

Article IV. That petitioner be permitted to remain in possession of his assets and continue operating subject to the supervision and direction of the above-entitled Court, with the authority to employ workmen and the necessary labor as may be required, including the right to incur obligations as may be authorized and permitted from time to time by the above-entitled Court, and to secure said obligations if required so to do as may be ordered and directed by the above-entitled Court.

Article V. All debts incurred after the filing of this petition prior to the confirmation of the plan of arrangement shall be paid in full and in such manner as ordered by the above-entitled Court.

Article VI. The Court shall retain jurisdiction of the debtor's property and the operation of same until the payment in full of all creditors' claims and this Honorable Court be authorized, [5] in its

discretion, to countersign all checks signed by the debtor in possession.

Article VII. In the event any claim is in controversy in respect to classification or the amount due, the debtor, under order of the Court, may make such deposit in such manner as the Court may direct in respect to said disputed claim and proceed to pay other creditors and be restored to possession pending a final determination of said disputed claim.

XI.

That your petitioner is advised that Chapter XI of the Bankruptcy Act is the appropriate section of the Act under which to seek relief and that your petitioner verily believes that if his business can be operated in the manner herein designated and if permitted to continue to operate as proposed in this petition, your petitioner can pay all his just debts in full.

That it is necessary for the speedy and proper administration of the debtor's affairs and the equitable payment of creditors, that all creditors and parties be enjoined from commencing or prosecuting any suit or foreclosure proceeding in any form or manner other than before the above-entitled Court or without permission of the above-entitled Court.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act as amended. That all creditors and other

parties be enjoined from commencing any suit in any Court or conducting any sale or foreclosure proceedings affecting the property of the petitioner or repossessing any property without order of this Honorable Court first had and obtained. That this Honorable Court leave the debtor in possession, with full authority to operate and carry on the debtor's business affairs pending a confirmation of the debtor's proposed plan of arrangement and that an adjudication be stayed. That this Honorable Court require debtor [6] to open the necessary bank account or accounts for the purpose of properly conducting the business and that the funds may be withdrawn upon the signature and countersignature as this Honorable Court may direct and to take such other steps and make such other orders herein as may be necessary for the protection of the debtor and all interested parties, and that your petitioner be granted such other and further relief as is just and proper in the premises.

/s/ ARLIE R. LOCKWOOD.

PAUL MAGASIN, and

COBB & UTLEY,

By /s/ FRANCIS B. COBB,

Attorneys for Debtor.

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the petitioning debtor mentioned and described in the foregoing petition, here-

by make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 30th day of August, 1946.

[Seal] /s/ BLANCH MORRIS,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires July 22, 1947.

[Endorsed]: Filed August 30, 1946. [7]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on August 30, 1946, before the said Court the petition of Arlie R. Lockwood that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and

that the said Arlie R. Lockwood shall attend before said referee on Sept. 6, 1946, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on August 30, 1946.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ F. BETZ,
Deputy Clerk.

[Endorsed]: Filed August 30, 1946. [8]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Campbell Beaumont, Judge of the United States District Court in and for the Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy to whom the proceedings in this matter were referred, do hereby certify:

That on or about October 3, 1946, the Controller of the State of California duly filed a claim in the above-entitled bankruptcy proceedings on behalf of the State of California, asserting thereby that

there was due and owing the State of California from and by said Arlie R. Lockwood, motor vehicle fuel license taxes in the sum of \$29,280.85. The original of said claim is attached hereto and made a part hereof.

That on or about October 10, 1946, the above-named debtor and E. A. Lynch, as Receiver for his estate, filed written objections to the allowance of said claim. The original of said objections is attached hereto and made a part hereof.

That on or about October 17, 1946, the Controller of the State of California, with the consent of the court, filed an amended proof of priority claim for taxes in the above-entitled bankruptcy proceedings on behalf of the State of [9] California, asserting thereby that there was due and owing the State of California from and by said Arlie R. Lockwood, motor vehicle fuel license taxes in the sum of \$31,-017.47, plus additional interest amounting to \$71.42 for each month and every month or fraction thereof commencing November 1, 1946, to date of payment. The original of said claim is attached hereto and made a part hereof.

That on or about October 22, 1946, the above-named debtor and E. A. Lynch, as Receiver for his estate, duly filed an objection to the allowance of said amended claim and for ground of objection alleged that the above-named debtor is not indebted to the Controller of the State of California for any sum or amount, and particularly is not indebted for any of the items or alleged taxes set forth in said

amended claim; that the above-named debtor has not sold or distributed gasoline during the months of January, May, June, July and September, 1945, or April and May, 1946, on which a tax has not been paid and that all the gasoline sold by the debtor was gasoline on which the motor vehicle fuel license tax had been paid to the State of California; that said jeopardy determination was made upon suspicion and without a factual or a legal basis for the making of the same; that penalties of \$14,284.08 and \$1,428.42 set forth in said amended claim may not properly be claimed against the above-entitled estate; that no interest is due with respect to said amended claim on the ground that no sum is due upon which interest may be computed; that the claim does not contain a sufficient itemization of the transactions forming the basis for the assessment of said taxes. The original of said objection it attached hereto and made a part hereof.

That the objections of the above-named debtor and E. A. Lynch, as Receiver for said debtor, to said amended claim of the [10] State of California heretofore filed herein on October 22, 1946, by the Controller of the State of California came on regularly for hearing on the 22nd and 28th days of October, and the 1st and 27th days of November, 1946, Paul Magasin and Cobb and Utley, Esqs., appearing as attorneys for said debtor, Dechter, Hoyt, Pines & Walsh, by Harry A. Pines, appearing as attorneys for said Receiver, and Robert W. Kenny, Attorney General of the State of California and Daniel N. Stevens, Deputy Attorney General of

the State of California, appearing as attorneys for the Controller of the State of California, and oral and documentary evidence having been introduced on behalf of all of said parties and the court having considered the same and heard the arguments of counsel and being fully advised, on January 16, 1947, your Referee made, signed and filed an Order in which he found that each of said objections to said amended claim is not sustained by the proof and that said amended claim was supported in its entirety by the testimony at said hearing, and was, therefore, duly approved and ordered that said objections be overruled and said amended claim allowed as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest amounting to \$71.54 for each and every month or fraction thereof after December 31, 1946, to date of payment. The original of said Order is attached hereto and made a part hereof.

That on January 21, 1947, said Receiver filed his petition for instructions as to whether he should file a petition for review of said order. The original of said petition is attached hereto and made a part hereof.

That on January 21, 1947, your Referee made, signed and filed an Order instructing said Receiver not to file a petition for review of said Order of January 16, 1947. The original of said Order is attached hereto and made a part hereof. [11]

That on January 25, 1947, the above-named debtor filed his petition for review of said order of January 16, 1947, and requesting that your Referee prepare

his Certificate on Review and add thereto the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and Receiver to said claim and amendments thereto; all exhibits offered and received at the hearing on said objections to said claim; the reporter's transcript of proceedings had upon the hearing of the objections to said claim; the order allowing said claim after hearing said objections thereto; the Receiver's petition for instructions and order thereon; and the debtor's petition for review. The original of said petition is attached hereto and made a part hereof.

That because of the extended period of time and the number of days on which testimony was given at the hearing upon the debtor's objections to said amended claim of the Controller of the State of California, your Referee is unable to prepare a narrative statement of the evidence without a reporter's transcript of said proceedings; that no reporter's transcript of said proceedings has been furnished your Referee for this purpose.

That on July 10, 1947, the Controller of the State of California filed a petition for an Order to Show Cause, reciting that the attorneys for the Controller of the State of California have requested the attorneys for said debtor on numerous occasions to pay the fee necessary for the preparation of said reporter's transcript but said attorneys for said debtor have neglected and failed to pay the necessary fee for the preparation of said transcript and that approximately six months have elapsed since

the filing of the petition for review by said debtor and praying that an Order to Show Cause issue out of the above-entitled Court directing the above-named debtor to appear at a time and place [12] certain to show cause, if any he has, why he has failed to have prepared the reporter's transcript of the hearing on objections to said amended claim of the Controller of the State of California and why said Referee should not prepare his certificate on review including therein only the claim of the Controller of the State of California and amendments thereto; objections by the debtor and receiver to said claim and amendments thereto; the order of January 16, 1947, allowing said claim after hearing objections thereto; the petition of the receiver for instructions and order thereon; and the debtor's petition for review of said order of January 16, 1947. The original of said petition is attached hereto and made a part hereof.

On July 10, 1947, pursuant to the petition of the Controller of the State of California, your Referee made, signed and filed an Order that Arlie R. Lockwood, the debtor herein be and appear before the undersigned Referee in Room 343 Federal Building, Los Angeles 12, California, on the 17th day of July, 1947, at the hour of 10:00 a.m., then and there to show cause, if any he has, why said Referee should not prepare his certificate on review of the order of January 16, 1947, allowing the claim of the Controller of the State of California after hearing objections thereto, without including therein or attaching thereto a reporter's transcript of the pro-

ceedings had upon the hearing of said objections to said claim and why said Referee should not include therein only the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said debtor's petition for review. The original of said Order is attached hereto and made a part hereof. [13]

That on July 17, 1947, at the time and place specified in said Order to Show Cause of July 10, 1947, no appearance was made by or on behalf of the above-named debtor and your Referee ordered that the petition of the Controller be granted and that his certificate on review of the Order of January 16, 1947, be prepared without a narrative statement of facts and without the reporter's transcript of the hearing on the objections of said debtor and said Receiver to said amended claim of the Controller of the State of California, and including therein only the claim of the Controller of the State of California and amendments thereto; objections by the debtor and Receiver to said claim and amendments thereto; the Order of January 16, 1947, allowing said claims after hearing objections thereto; the petition of the Receiver for instructions and order thereon and the debtor's petition for review of said Order of January 16, 1947. The original of said Order is attached hereto and made a part hereof.

Your Referee submits herewith the following:

1. Claim for motor vehicle fuel license taxes in the sum of \$29,280.85 (October 4, 1946).
2. Objection to Claim of Controller of the State of California (October 11, 1946).
3. Amended Proof of Priority Claim for Taxes (October 17, 1946).
4. Objection to Amended Claim of Controller of the State of California (October 22, 1946).
5. Order Allowing Claim after Hearing Objections Thereto (January 16, 1947).
6. Petition for Instructions (January 20, 1947).
7. Order Instructing Receiver not to file Petition for Review or Order of January 16, 1947 (January 21, 1947).
8. Debtor's Petition for Review of Referee's Order [14] Allowing Claim after Hearing Objections Thereto (January 25, 1947).
9. Petition of the Controller of the State of California for Order to Show Cause Re Omission of Narrative Statement of Evidence and Reporter's Transcript from Referee's Certificate on Review (July 10, 1947).
10. Order to Show Cause (July 10, 1947).
11. Order Re Omission of Narrative Statement

of Evidence and Reporter's Transcript from
Referee's Certificate on Review (July 17, 1947).

Dated: November 3, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 4, 1947. [15]

State of California
Office of the Controller
Sacramento

October 3, 1946

Honorable H. L. Dickson
Referee in Bankruptcy
3rd Floor, Federal Bldg.
Temple and Spring Sts.
Los Angeles 12, Calif.

Re: Arlie R. Lockwood
Bankruptcy No. 44536B

Dear Sir:

We are enclosing herewith Proof of Priority Claim for taxes due the State of California under the Motor Vehicle Fuel License Tax Law. Said claim has been duly signed and sworn to and we trust that you will file the same in order that it may be given attention at the proper time.

Attached to said claim you will find an itemized statement of the amount now due submitted as Exhibit A. The total now due including accrued penalty and interest is \$29,280.85. Please under-

stand that the taxes due in this case are subject to interest at the rate of $\frac{1}{2}$ of 1% per month or fraction thereof from due date to date of payment. Our claim includes interest to November 1, 1946, subsequent to which date interest will accrue in the amount of \$67.35 for each month or fraction thereof.

When drawing check in payment of this claim, kindly make the same payable to Thomas H. Kuchel, State Controller, and forward the same direct to him at Sacramento, attention the writer.

Very truly yours,

THOMAS H. KUCHEL,
Controller.

By /s/ L. A. McKEE.

LAM:vs

Enc.

In the District Court of the United States in and for
the Southern District of California, Central
Division

No. 44536B in Bankruptcy

In the Matter of
ARLIE R. LOCKWOOD,

Debtor.

PROOF OF PRIORITY CLAIM FOR TAXES

Account No. B-1385

On the 3rd day of October, 1946, came Bert Foster, and made oath and said that he is a Deputy

Controller of the State of California, and as such he is qualified and empowered to make this claim on behalf of the State of California;

That he is informed and believes that the said Arlie R. Lockwood, debtor, was, at or before the filing of the petition in the above-entitled matter, and is now justly and truly indebted to the State of California in the sum of \$29,280.85, plus additional interest amounting to \$67.35 for each and every month or fraction thereof commencing November 1, 1946;

That the consideration of the debt is a tax duly levied and assessed under the provisions of the "Motor Vehicle Fuel License Tax Law" (Sections 7301-8403 Revenue & Taxation Code, State of California) with penalties and interest; that attached hereto and marked "Exhibit A" is an itemized statement showing the amount of tax, penalties and interest which have accrued, and the amount of interest which will hereafter accrue; [17]

That this claim is entitled to the priority provided by Section 64-a of the Bankruptcy Act;

That the due date for said tax is past; that no part of said tax, interest or penalty has been paid; that there are no set-offs or counter claims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any person, to his knowledge or belief, for the use or benefit of the State of California, had or received any manner of security for the said tax, penalties or interest whatever, Except the lien which attached

pursuant to law (Sec. 7871, Revenue and Taxation Code).

[Seal] /s/ BERT FOSTER,

Deputy Controller of the
State of California.

Subscribed and sworn to before me this 3rd day
of October, 1946.

/s/ L. A. McKEE,

Chief, Division of Tax
Collection. [18]

Exhibit A

Arlie R. Lockwood
8132 Atlantic Blvd.
Bell, California

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Month and Year	Additional of Gallons Distributed	No.	Amt. of Tax	Penalty Amt.	Interest to 9/1/46 No. Mos.	Amount
1/45	4,349		\$ 130.47	\$ 130.47	(18)	\$ 11.74
5/45	71,496		2,144.88	2,144.88	(14)	150.14
6/45	216,539		6,496.17	6,496.17	(13)	422.25
7/45	138,805		4,164.15	4,164.15	(12)	249.85
9/45	17,787		533.61	533.61	(10)	26.68
	448,976		\$13,469.28	\$13,469.28		\$860.66
Total of This Determination.....						\$27,799.22
10% Penalty accrued September 5, 1946, pursuant to Section 7660 of the Revenue and Taxation Code, Div. 2, Part 2.....						1,346.93
Accrued Interest to November 1, 1946.....						134.70
						<hr/> \$29,280.85

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage considered as illegal distributions of Motor Vehicle Fuel pursuant to audits of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue and Taxation Code, Division 2, Part 2.

[Endorsed]: Filed October 4, 1946. [19]

[Title District Court and Cause.]

NOTICE OF HEARING ON OBJECTION
TO CLAIM

To: The Controller of the State of California; and
L. A. McKee, Chief, Division of Tax Collection.

You and Each of You Will Please Take Notice that Arlie R. Lockwood, debtor, and E. A. Lynch, as Receiver for his estate, has filed their written objections to your claim against the above-entitled estate, a copy of which objections is attached hereto.

You are further notified that the hearing will be had upon said objections before Hugh L. Dickson, Referee in Bankruptcy, at the courtroom of said Referee in the Federal Building, Los Angeles, California, on October 17, 1946, at the hour of 2:00 p.m., or as soon thereafter as counsel may be heard.

Dated: October 10, 1946.

PAUL MAGASIN and
COBB & UTLEY

By /s/ ERNEST R. UTLEY,
Counsel for Debtor. [21]

[Title of District Court and Cause.]

OBJECTION TO CLAIM OF CONTROLLER
OF THE STATE OF CALIFORNIA

Come now the above-named Debtor and E. A. Lynch, Receiver for the above-named Debtor, and object to the claim of the Controller of the State of California being dated October the 3d, 1946, in the amount of \$29,280.85, and for ground of objection set forth:

I.

That the above-named debtor is not indebted to the Controller of the State of California for any sum or amount, and is particularly not indebted for any of the items or alleged taxes set forth in Exhibit "A" attached to said claim.

II.

That the above-named debtor has not sold or distributed gasoline during the months as set forth in Exhibit "A" on which a tax has not been paid, and alleges the true facts to be that all the said gasoline sold by the Debtor was gasoline on which the motor vehicle fuel tax has been paid to the State of California.

III.

That said jeopardy determination alleged to have been [22] made pursuant to Section 7727 and 7728 of the Revenue and Taxation Code of the State of California was made upon suspicion and without a factual or legal basis for the making of the same.

Wherefore, your objectors pray that a hearing be had and that it be adjudged and determined that the above-entitled debtor and his estate are not liable to the Controller of the State of California for any sum or amount for taxes, interest or penalties as is claimed or asserted by reason of the claim on file herein.

Dated this 10th day of October, 1946.

/s/ ARLIE R. LOCKWOOD,
Debtor.

/s/ E. A. LYNCH,
Receiver.

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the debtor mentioned and described in the foregoing objection, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 10th day of October, 1946.

[Seal] /s/ BLANCHE MORRIS,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed October 11, 1946. [23]

[Title of District Court and Cause.]

AMENDED PROOF OF PRIORITY
CLAIM FOR TAXES

On the sixteenth day of October, 1946, came Ewing Hass, and made oath and said that he is a Deputy Controller of the State of California, and as such he is qualified and empowered to make this claim on behalf of the State of California;

That he is informed and believes that the said Arlie R. Lockwood, debtor, was, at or before the filing of the petition in the above-entitled matter, and is now justly and truly indebted to the State of California in the sum of \$31,017.47, plus additional interest amounting to \$71.42 for each and every month or fraction thereof commencing November 1, 1946;

That the consideration of the debt is a tax duly levied and assessed under the provisions of the "Motor Vehicle Fuel License Tax Law" (Sections 7301-8403 Revenue & Taxation Code, State of California) with penalties and interest; that attached hereto and marked "Exhibit A" is an itemized statement showing the amount of tax, penalties and interest which have accrued, and the amount of interest which will hereafter accrue;

That also attached hereto and marked "Exhibit B," "Exhibit C," "Exhibit D," and "Exhibit E," are copies of the notices of determination, [25] which determinations were heretofore duly made pursuant to law, and copies of which notices were heretofore duly mailed to said debtor; that said

“Exhibit B” was the basis of the original proof of debt filed herein; that this amended proof of debt includes in addition the amounts found to be due in “Exhibit C,” “Exhibit D,” and “Exhibit E;” that said “Exhibit A” is a combined statement showing tax, penalties and interest due under all four Notices of Determination;

That this claim is entitled to the priority provided by Section 64-a of the Bankruptcy Act;

That the due date for said tax is past; that no part of said tax, interest or penalty has been paid; that there are no set-offs or counterclaims to the same; that no note or judgment has been recovered therefor; that deponent has not, nor has any person, to his knowledge or belief, for the use or benefit of the State of California, had or received any manner of security for the said tax, penalties or interest whatever, Except the lien which attached pursuant to law (Sec. 7871, Revenue and Taxation Code).

[Seal] /s/ EWING HASS,
Deputy Controller of the
State of California.

Subscribed and sworn to before me this sixteenth day of October, 1946.

/s/ L. A. McKEE,
Chief, Division of Tax
Collection. [26]

"Exhibit A"

Arlie R. Lockwood
8132 Atlantic Blvd.
Bell, California

Mo. and Year	Tax	100% Pen.	10% Pen.	Interest to 10/31/46	Total
1/45	\$ 154.47	\$ 154.47	\$ 15.45	\$ 15.45	\$ 339.84
5/45	2,194.68	2,194.68	219.47	175.57	4,784.40
6/45	6,496.17	6,496.17	649.62	487.21	14,129.17
7/45	4,187.91	4,187.91	418.80	293.15	9,087.77
9/45	533.61	533.61	53.36	32.02	1,152.60
4/46	629.64	629.64	62.96	15.74	1,337.98
5/46	87.60	87.60	8.76	1.75	185.71
	<hr/> \$14,284.08	<hr/> \$14,284.08	<hr/> \$1,428.42	<hr/> \$1,020.89	<hr/> \$31,017.47

Interest of \$71.42 will accrue each month or fraction thereof subsequent to October 31, 1946.

Recapitulation

Total Tax	\$14,284.08
100% Penalty	14,284.08
10% Penalty	1,428.42
Interest to Oct. 1, 1946	1,020.89
<hr/> Total.....	<hr/> \$31,017.47

Make remittance payable to State Controller and mail with enclosed pink copy to State Board of Equalization, Sacramento, California.

Office of
State Board of Equalization
State of California
Sacramento

License No. B-1385
Date August 6, 1946

Penalty

Amounting to \$1,346.93 in addition to any shown below must be added after Sept. 5, 1946 if the amount of this notice is not paid on or before that date.

Notice of Determination—Motor Vehicle Fuel License Tax

Additional Interest

Arlie R. Lockwood
8132 Atlantic Blvd.
Bell, California

Amounting to \$67.35 must be added for each month or fraction thereof after Sept. 1, 1946, if the amount of this notice is not paid on or before that date.

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Mo. & Year	Additional No. of Gals. Distributed	Amt. of Tax	Rate	Penalty	Amount	No. of Mos.	Interest to 9-1-46	Total of This Determination
1/45	4,349	\$ 130.47		\$	130.47	(18)	\$ 11.74	\$ 272.68
5/45	71,496	2,144.88			2,144.88	(14)	150.14	4,439.90
6/45	216,539	6,496.17			6,496.17	(13)	422.25	13,414.59
7/45	138,805	4,164.15			4,164.15	(12)	249.85	8,578.15
9/45	17,787	533.61			533.61	(10)	26.68	1,093.90
					<u>\$13,469.28</u>			<u>\$860.66</u>
								\$27,799.22

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage considered as illegal distributions of motor vehicle fuel pursuant to audits of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue and Taxation Code, Division 2, Part 2.

Headquarters Office Copy No. 1

"Exhibit C"

Make remittance payable to State Controller and mail with enclosed pink copy to State Board of Equalization, Sacramento, California.

Office of
State Board of Equalization
State of California
Sacramento

License No. B-1324

Date August 6, 1946

Penalty

Amounting to \$7.38 in addition to any shown below must be added after Oct. 18, 1946 if the amount of this notice is not paid on or before that date.

Notice of Determination—Motor Vehicle Fuel License Tax

Additional Interest

Amounting to \$0.37 must be added for each month or fraction thereof after Sept. 1, 1946, if the amount of this notice is not paid on or before that date.

Archie R. Lockwood
Dependable Oil Company
8132 Atlantic Avenue
Bell, California

*** Copy ***

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Mo. & Year	Additional No. of Gals. Distributed	Amt. of Tax	Penalty		Total of This Determination
			Amount	No. of Mos.	
1/45	800	\$24.00	\$24.00	(18)	\$2.16
5/45	1,660	49.80	49.80	(14)	3.49
	2,460	\$73.80	\$73.80		\$5.65
					\$153.25

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage considered as illegal distributions of motor vehicle fuel pursuant to audits of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue and Taxation Code, Division 2, Part 2.

State Board of Equalization

/s/ DIXWELL L. PIERCE, Secretary.

Make remittance payable to State Controller and mail with enclosed pink copy to State Board of Equalization, Sacramento, California.

Office of
State Board of Equalization
State of California
Sacramento

License No. B-1324
Date August 6, 1946

Penalty
Amounting to \$2.38 in addition to any
shown below must be added after Oct. 18, 1946
if the amount of this notice is
not paid on or before that date.

Notice of Determination—Motor Vehicle Fuel License Tax

Additional Interest
Amounting to \$0.12 must be added for each
month or fraction thereof after Sept. 1, 1946,
if the amount of this notice is not paid on or
before that date.

Arlie R. Lockwood
Dependable Oil Company
8132 Atlantic Blvd.
Bell, California

*** Copy ***

You are hereby notified of an amount of tax, interest and penalty due from you as follows:

Mo. & Year	Additional No. of Gals. Distributed	Amt. of Tax	Rate	Penalty	No. of Mos.	Amount	Total of This Determination
7/45	792	\$23.76	100%		(12)	\$1.43	\$48.95

To levy and assess the Motor Vehicle Fuel License Tax on the above gallonage of kerosene illegally blended with a tax paid product and distributed as motor vehicle fuel pursuant to audit of your books and records as conducted by the staff of the Los Angeles office of this Board.

This Is a Jeopardy Determination Levied Pursuant to Section 7727 and 7728 of the Revenue and Taxation Code, Division 2, Part 2.

Controller's Office Copy No. 1

[Title of District Court and Cause.]

OBJECTION TO AMENDED CLAIM OF CONTROLLER OF THE STATE OF CALIFORNIA

Come now the above-named Debtor and E. A. Lynch, Receiver for the above-named Debtor, and object to the claim of the Controller of the State of California being dated October the 15th, 1946, in the amount of \$31,017.47, and for ground of objection set forth:

I.

That the above-named debtor is not indebted to the Controller of the State of California for any sum or amount, and is particularly not indebted for any of the items or alleged taxes set forth in Exhibit "A," "B" and "C" attached to said claim.

II.

That the above-named debtor has not sold or distributed gasoline during the months as set forth in Exhibit "A" and "B" on which a tax has not been paid, and allege the true facts to be that all the said gasoline sold by the Debtor was gasoline on which the motor vehicle fuel tax has been paid to the State of California. [32]

III.

That said jeopardy determination alleged to have been made pursuant to Section 7727 and 7728 of the Revenue and Taxation Code of the State of California was made upon suspicion and without

a factual or legal basis for the making of the same.

IV.

Object to that portion of the claim for penalties in the amount of \$14,284.08 and \$1,428.42 on the ground that said penalties are not proper as claimed against the above-entitled estate.

V.

Further object to any interest in respect to said claim on the ground that no sum is due upon which interest may be computed.

VI.

Object to the claim on the ground that the same does not contain a sufficient itemization of the transactions forming the basis for the assessment of said taxes.

Wherefore, your objectors pray that a hearing be had and that it be adjudged and determined that the above-entitled debtor and his estate are not liable to the Controller of the State of California for any sum or amount for taxes, interest or penalties as is claimed or asserted by reason of the claim on file herein.

Dated this 22d day of October, 1946.

/s/ ARLIE R. LOCKWOOD,
Debtor.

/s/ E. A. LYNCH,
Receiver. [33]

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the debtor mentioned and described in the foregoing objection, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 22d day of October, 1946.

/s/ FRANCIS B. COBB,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]. Filed October 22, 1946. [34]

[Title of District Court and Cause.]

ORDER ALLOWING CLAIM AFTER
HEARING OBJECTIONS THERETO

The objections of the above-named Debtor and E. A. Lynch, Receiver for said Debtor, to the amended claim of the State of California heretofore filed herein on October 17, 1946, by The Controller of the State of California, came on regularly for hearing on the 22nd and 28th days of October and the 1st and 27th days of November, 1946, Paul Magasin and Cobb & Utley, Esqu岸s, appearing as attorneys for said Debtor; Dechter, Hoyt, Pines & Walsh by Harry A. Pines appear-

ing as attorneys for said Receiver, and Robert W. Kenny, Attorney General of the State of California, and Daniel N. Stevens, Deputy Attorney General of the State of California, appearing as attorney for The Controller of the State of California, and oral and documentary evidence having been introduced on behalf of all of said parties, and the Court having considered the same and heard the arguments [35] of counsel and being fully advised, it is found that said objections are not sustained by the proof, and said claim otherwise having been duly examined and found in form duly proved,

It Is Ordered that said objections be, and they hereby are, overruled, and said claim is allowed as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest amounting to \$71.54 for each and every month or fraction thereof after December 31, 1946, to date of payment.

Jan. 16, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed December 20, 1946. [36]

[Title of District Court and Cause.]

PETITION FOR INSTRUCTIONS

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy for the Above-Entitled Debtor
Estate:

The verified petition of E. A. Lynch respectfully
represents:

I.

That he is the duly appointed, qualified and act-
ing Receiver of the above-entitled debtor.

II.

That the proceeding herein is a Chapter XI
proceeding.

III.

That an order has been made in this proceeding
allowing the claim of the State of California for
alleged motor vehicle fuel taxes, interest and pen-
alties, aggregating the sum of approximately \$29,-
000.00. That your petitioner is informed that said
order was signed by the Referee in Bankruptcy
herein on January 16, 1947, and said order will
become final unless a review is taken therefrom on
January 27th, 1947.

IV.

Your petitioner is informed by his attorneys that
in the opinion of said attorneys, the allowance of
the claim aforesaid [38] constituted error; and that
if said order becomes final it will serve to make a
plan of arrangement impossible, and, in all prob-

ability, would leave nothing for the benefit of general creditors upon the adjudication of the debtor.

V.

Your petitioner is further informed that the debtor has certain assets consisting of leases, which carry forfeiture clauses in the event of bankruptcy, and that it would be of irreparable damage to general creditors for the debtor to be adjudicated prior to the final determination of the validity of the claim of the said State Board of Equalization of the State of California.

VI.

Your petitioner desires the instruction of the Court whether, in the event the debtor does not file a petition for review from the Court's order of January 16, 1947, such a petition for review should be filed by your petitioner.

Wherefore, your petitioner prays for an order of instructions instructing him whether to file a petition for review of the Court's order of January 16, 1947, and prosecute the same; or, in the alternative, whether your petitioner should take steps toward the adjudication of the debtor as a bankrupt.

/s/ E. A. LYNCH,
Petitioner.

DECHTER, HOYT, PINES &
WALSH,

By /s/ HARRY H. PINES,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed January 20, 1947. [39]

[Title of District Court and Cause.]

ORDER ON RECEIVER'S PETITION
FOR INSTRUCTIONS

Upon the reading and filing of the verified petition for instructions of E. A. Lynch, the Receiver herein, as to whether said Receiver should file a review from the Court's order of January 16, 1947, and it appearing to the Court that any review from such order should be prosecuted by the debtor, if at all; and it further appearing that it is in the best interests of this estate that the Receiver not file such a petition for review from said order;

It Is Ordered that the Receiver herein be and he is hereby instructed not to file a petition for review from the order of this Court dated January 16, 1947.

Dated this 21st day of January, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed January 21, 1947. [41]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER ALLOWING CLAIM AFTER
HEARING OBJECTIONS THERETO.

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner, Arlie R. Lockwood, debtor in the above-entitled proceedings, and petitions for a review of an order made and entered on the 16th day of January, 1947, entitled "Order Allowing Claim After Hearing Objections Thereto" and respectfully shows:

I.

That your petitioner is the debtor in the above-entitled proceeding and that the claim allowed by said order materially affects your petitioner and that your petitioner desires to review the same as provided by law.

II.

That your petitioner is the debtor in possession and is an interested party to this proceeding and is affected by the said order allowing the claim of The Controller of the State of California. [42]

III.

That the above-entitled Court erred in not permitting E. A. Lynch, as receiver for the above-entitled estate, to review said order allowing the claim of The Controller of the State of California, where the receiver sought so to do and the estate

is affected by said order and is in possession of property of your petitioner, which should be used for the purpose of preparing a transcript and expenses of reviewing said order.

IV.

That the Referee erred in not making findings of fact in respect to the amounts and items claimed and asserted as constituting said claim of The Controller of the State of California where said findings were requested and are necessary to show the basis for the order sought to be reviewed herein.

V.

That the Referee erred in allowing said claims for the amount for which the same was filed herein and where admitted credits were due in respect to said claim.

VI.

The Referee erred in allowing said claim where there was no evidence showing that Arlie R. Lockwood was a distributor of gasoline under the Revenue and Tax Code of the State of California and the evidence was contrary thereto and showed that the above-named debtor was a broker.

VII.

The Court erred in allowing said claim based upon the sale of gasoline where the undisputed evidence showed that all taxes had been previously paid to the manufacturer and distributor of said gasoline.

VIII.

The Court erred in allowing said claim based upon a jeopardy determination made by the State Board of Equalization [43] which jeopardy determination had not become final at the time of the filing of the above-entitled proceedings and was not made upon any legal and competent evidence. No legal and competent evidence was offered showing that there was any sale by Lockwood as a distributor of gasoline.

IX.

The Court erred in allowing said claim, including a one hundred per cent penalty, being contrary to the Bankruptcy Act and said assessment of penalty not having been made prior to the filing of the petition herein and the jeopardy assessment not having become final at the time of the filing of the petition herein.

X.

The Court erred in receiving as evidence the testimony of an auditor of the State Board of Equalization, which audit was based upon certain delivery slips which were shown to have been duplicated by invoices and which were not entered and did not form a part of the records of the debtor.

XI.

The Court erred in finding that said claim was a prior claim for taxes in the sum of \$31,212.08, which sum included a fifty per cent penalty and which should be reduced by the elimination of said penalty.

XII.

The Court erred in not finding the type of business said Arlie R. Lockwood was engaged in and whether he was a broker or a distributor.

XIII.

The Court erred in disallowing said claim on the ground that the debtor had failed to sustain the burden of proof where the Court announced at the beginning of said case that the burden or proof was upon the claimant and the claimant acquiesced in said [44] ruling by assuming to undertake the burden of proving and establishing said claim.

Wherefore, petitioner feeling aggrieved because of the order heretofore referred to and the failure of the Referee to make findings of fact and conclusions of law, prays that said order be reviewed as provided by Section 39-c of the Bankruptcy Act, as amended.

That upon said review, said order be reversed and annulled and that petitioner be granted such appropriate and proper relief in the premises as is just and proper.

That the Referee prepare his certificate on review and add thereto the following:

1. Claim of The Controller of the State of California and amendments thereto and exhibits attached thereto.

2. Objections by the debtor and receiver to said claim and amendments thereto.

3. All exhibits offered and received in the above-entitled matter.

4. Reporter's transcript of proceedings had upon the hearing upon the said claim.

5. Order allowing claim after hearing objections thereto.

6. Petition for Instructions and Order Thereon.

7. This petition for review.

Respectfully submitted,

/s/ ARLIE R. LOCKWOOD,
Debtor,
Petitioner.

PAUL MAGASIN &
COBB & UTLEY,

By /s/ FRANCIS B. COBB,
Attorneys for Debtor.

State of California,
County of Los Angeles—ss.

I, Arlie R. Lockwood, the debtor mentioned and described in the foregoing Petition, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

/s/ ARLIE R. LOCKWOOD.

Subscribed and sworn to before me this 25th day of January, 1946.

[Seal] /s/ HELEN A. NELSON,
Notary Public in and for
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 25, 1947. [46]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE

Comes now the Controller of the State of California by Fred N. Howser, Attorney General, and Daniel N. Stevens, Deputy Attorney General, and alleges:

I.

That on January 16, 1947, the Honorable Hugh L. Dickson, Referee in Bankruptcy, signed and filed his order overruling the objections of the above-named debtor to the amended claim of the State of California for Motor Vehicle Fuel License taxes heretofore filed herein on October 17, 1946, and allowing said claim as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest thereon amounting to \$71.54 for each and every month or fraction thereof after December 31, 1946, to date of payment.

II.

That on January 25, 1947, said debtor filed his petition for review of said order and requesting that the Referee prepare [48] his certificate on review and add thereto the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; all exhibits offered and received at the hearing on said objections to said claim; the reporter's transcript of proceedings had upon the hearing upon the hearing upon the said claim; the order allowing said claim after hearing said objections thereto; the receiver's petition for instructions and order thereon; and the debtor's petition for review.

III.

That the above-named Referee has stated that because of the extended period of time and the number of days on which testimony was given at the hearing upon the debtor's objections to said claim, he is unable to prepare a narrative statement of the evidence without a reporter's transcript of said proceedings.

IV.

That the attorneys for the Controller of the State of California have requested the attorneys for said debtor on numerous occasions to pay the fee necessary for the preparation of said reporter's transcript, but said attorneys for said debtor have neglected and failed to pay the necessary fee for the

preparation of said transcript; that approximately six months have elapsed since the filing of the petition for review by said debtor.

V.

If said claim of the Controller of the State of California is a valid one, no plan of arrangement will be possible in this proceeding inasmuch as expenses of administration and said claim will exceed the total value of the debtor's assets; that no further proceedings in connection with said Chapter XI proceedings are practicable until a final determination is made of the [49] validity of said referee's order of January 16, 1947.

Wherefore, your Petitioner prays:

That an Order to Show Cause issue out of the above-entitled Court directing the above-named debtor to appear at a time and place certain to show cause, if any he has, why he has failed to have prepared the reporter's transcript of the hearing on objections to said amended claim of the Controller of the State of California and why said Referee should not prepare his certificate on review including therein only the claim of the Controller of the State of California and amendments thereto; objections by the debtor and receiver to said claim and amendments thereto; the order of January 16, 1947, allowing said claim after hearing objections thereto; the petition of the receiver for instructions and order thereon; and the debtor's

petition for review of said order of January 16, 1947.

THE CONTROLLER OF THE
STATE OF CALIFORNIA,

By /s/ FRED N. HOWSER,
Attorney General.

/s/ DANIEL N. STEVENS,
Deputy Attorney General, Attorneys for Said
Claimant. [50]

State of California,
County of Los Angeles—ss.

Daniel N. Stevens, being by me first duly sworn, deposes and says that he is one of the attorneys for the Claimant, State of California, in the foregoing and above-entitled action; that he has read the foregoing Petition for Order to Show Cause and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ DANIEL N. STEVENS.

Subscribed and sworn to before me this 10th day of July, 1947.

/s/ ELSIE A. GOODYE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 18, 1949.

[Endorsed]: Filed July 10, 1947. [51]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading and filing the verified Petition of the Controller of the State of California by Fred N. Howser, Attorney General of the State of California, and Daniel N. Stevens, Deputy Attorney General, and good cause appearing therefor,

It Is Hereby Ordered that Arlie R. Lockwood, the debtor herein be and appear before the undersigned Referee in Room 343 Federal Building, Los Angeles 12, California, on the 17th day of July, 1947, at the hour of 10:00 a.m., then and there to show cause, if any he has, why said Referee should not prepare his certificate on review of the order of January 16, 1947, allowing the claim of the Controller of the State of California after hearing objections thereto, without including therein or attaching thereto a reporter's transcript of the proceedings had upon the hearing of said objections to said claim and why said Referee should not include therein only the claim of the Controller of the State of California and amendments thereto and exhibits [52] attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said debtor's petition for review.

It Is Further Ordered that service of this order may be made by depositing a copy of said order

in the United States Post Office, postage prepaid, and addressed to Paul Magasin and Cobb & Utley, 639 South Spring Street, Los Angeles 14, California, attorneys for the above-named debtor.

Dated at Los Angeles, California, July 10, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 10, 1947. [53]

[Title of District Court and Cause.]

ORDER RE OMISSION OF NARRATIVE
STATEMENT OF EVIDENCE AND RE-
PORTER'S TRANSCRIPT FROM REF-
EREE'S CERTIFICATE ON REVIEW

An Order having heretofore been issued on the 10th day of July, 1947, upon the petition of the Controller of the State of California, requiring Arlie R. Lockwood, the above-named debtor, to appear before the above-entitled court in the Courtroom of the Honorable Hugh L. Dickson, Referee in Bankruptcy, on the 17th day of July, 1947, at 10:00 a.m. and then and there to show cause, if any he has, why said Referee should not prepare his Certificate on Review of the Order of January 16, 1947, allowing the claim of the Controller of the State of California after hearing objections thereto without including therein or attaching thereto a reporter's transcript of the proceedings

had upon the hearing of said objections to said claim, and why said Referee should not include therein only the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the Order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said [56] debtor's petition for review; said matter came on for hearing on May 22, 1947, at 10:00 a.m. before the Honorable Hugh L. Dickson, Referee in Bankruptcy, presiding, Fred N. Howser, Attorney General of the State of California, and Daniel N. Stevens, Deputy Attorney General, appearing as attorneys for the Controller of the State of California, and no one appearing for Arlie R. Lockwood, the above-named debtor; and proof of service of the aforesaid Order to Show Cause having been filed with said court and no showing having been made at said hearing to contradict the facts alleged in the verified petition of the Controller of the State of California for said Order to Show Cause, the court hereby finds that all of the allegations of said petition are true;

Now, Therefore, It Is Hereby Ordered that the Referee shall prepare his Certificate on Review of said Order of January 16, 1947, without including therein or attaching thereto a reporter's transcript of the proceedings had upon the hearing of said objections to said claim and that said Referee shall not include therein a narrative statement of the

evidence produced on the hearing of the objections to the claim of the Controller for motor vehicle fuel license taxes, and that said Referee shall include in his Certificate on Review of said Order of January 16, 1947, only the claim of the Controller of the State of California and amendments thereto and exhibits attached thereto; the objections by the debtor and receiver to said claim and amendments thereto; the order allowing claim after hearing objections thereto; the receiver's petition for instructions and order thereon; and said debtor's petition for review.

Dated: July 17, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed (Referee's Certificate on Review and attached documents (Pages 11 to 52 of this printed record)]: Filed Nov. 4, 1947, [57] U.S.D.C.

[Title of District Court and Cause.]

REFEREE'S SUPPLEMENTARY
CERTIFICATE ON REVIEW

To the Honorable Campbell Beaumont, Judge of
the United States District Court in and for the
Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy to
whom the proceedings in this matter were referred,
do hereby certify:

1. That on January 16, 1947, your Referee made,
signed and filed an Order allowing the claims of
the Controller of the State of California as a prior
lien claim for taxes in the sum of \$31,212.08, together
with additional interest amounting to \$71.54
for each and every month or fraction thereof after
December 31, 1946, to date of payment;

2. That on January 5, 1948, the following Order
was entered in the minutes of Judge Harrison:

"The petition of the Debtor for Review of
the Referee's Order of Jan. 16, 1947, having
been heretofore submitted upon the filing of
briefs, and the briefs of counsel having been
filed, and the court having [58] considered the
record, the court hereby directs that this matter
be remanded to the Referee with directions
to prepare adequate findings of fact and conclusions
of law. I feel that this disposition of
the pending review may preclude a reversal by
the Circuit Court on technical grounds."

3. That on September 3, 1948, your Referee made, signed and filed a nunc pro tunc Order amending the aforesaid Order allowing the claim of the Controller of the State of California;

4. That on September 23, 1948, your Referee made, signed and filed Findings of Fact and Conclusions of Law pursuant to the aforesaid Order of Judge Harrison.

Your Referee submits herewith the following:

1. Nunc pro tunc Order amending Order allowing claim after hearing objections thereto, and

2. Findings of Fact and Conclusions of Law re claim of the Controller of the State of California.

Dated: This 28th days of January, 1949.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 8, 1949. [59]

[Title of District Court and Cause.]

NUNC PRO TUNC ORDER AMENDING
ORDER ALLOWING CLAIM AFTER
HEARING OBJECTIONS THERETO

Whereas, it appears that an Order was made and entered on the 16th day of January, 1947, entitled "Order Allowing Claim After Hearing Objections Thereto"; and

Whereas, it appears that it was thereby ordered that the Amended Claim filed by the Controller of the State of California be allowed as a prior lien claim for taxes in the sum of \$31,212.08, together with additional interest amounting to \$71.54 for each and every month, or fraction thereof, after December 31, 1946, to date of payment; and

Whereas, it now appears that said figures were incorrectly set forth as a result of clerical error; and

Whereas, it further appears that said claim should have been allowed as a prior lien claim for taxes in the sum of \$31,160.31 together with additional interest amounting to \$71.42 for each and every month, or fraction thereof, after December 31, 1946, to date of payment, [60]

It Is Hereby Ordered that the aforesaid Order Allowing Claim After Hearing Objections Thereto which was made and entered on the 16th day of January, 1947, in the above-entitled proceedings, be and the same hereby is amended nunc pro tunc to provide that the figure "\$31,160.31" be substituted in lieu of the figure \$31,212.08, and that the figure "\$71.42" be substituted for the figure \$71.54.

Dated this 3rd day of September, 1948.

/s/ HUGH L. DICKSON,

Referee in Bankruptcy.

[Endorsed]: Filed September 3, 1948. [61]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE CLAIM OF THE CONTROL-
LER OF THE STATE OF CALIFORNIA

The objections of the above-named Debtor and E. A. Lynch, Receiver, for said Debtor, to the Amended Claim of the State of California, filed herein on October 17, 1946, by the Controller of the State of California, having come on regularly for hearing on the 22nd and 28th days of October, and the 1st and 27th days of November, 1946; Messrs. Paul Magasin and Cobb & Utley, appearing as attorneys for said Debtor; Dechter, Hoyt, Pines & Walsh by Harry A. Pines, Esq., appearing at attorneys for said Receiver, and Robert W. Kenny, Attorney General of the State of California, and Daniel M. Stevens, Deputy Attorney General of the State of California, appearing as attorneys for the Controller of the State of California; and oral and documentary evidence having been introduced in behalf of all of said parties, the Court then considered the same, heard the arguments of counsel, and being fully advised in the premises the Court now makes its Findings of Fact as follows: [62]

FINDINGS OF FACT

I.

That the above-entitled proceedings were initially commenced on August 30, 1946, by the filing of a

petition by the above-named Debtor in this Court under Chapter XI of the Bankruptcy Act.

II.

That on October 4, 1946, the Controller of the State of California filed a verified claim in the above-entitled proceedings asserting thereby that there was due and owing to the State of California from and by Arlie R. Lockwood, the above-named Debtor, motor vehicle fuel license taxes in the sum of \$29,280.85.

III.

That on October 11, 1946, Arlie R. Lockwood and E. A. Lynch, as the Receiver for said Debtor's estate, filed written objections to the allowance of said claim.

IV.

That on or about October 17, 1946, the Controller with the consent of the Court filed an Amended Proof of Priority Claim for Taxes in the sum of \$31,017.47 plus additional interest in the amount of \$71.42 for each and every month, or fraction thereof, commencing November 1st, 1946, to date of payment. To this claim were attached copies of four notices of determination under Sections 7727 and 7728 of the Revenue and Taxation Code of the State of California upon which said claim was based, together with a statement showing the total amount of tax penalties and interest due under all four of said Notices of Determination to October 31, 1946, as a result of the distribution of

motor vehicle fuel by said Arlie R. Lockwood without first having secured a license for that purpose as required by [63] Section 7451 of the Revenue and Taxation Code of the State of California and without having made payment of the tax imposed by the Revenue and Taxation Code of the State of California with respect to such distribution.

V.

That on or about October 22, 1946, the above-named Debtor and E. A. Lynch as Receiver for Debtor's estate duly filed Objections to the Allowance of the aforesaid Amended Claim of the Controller of the State of California thereby alleging that the above-named Debtor is not indebted to the Controller of the State of California for any sum or amount, and particularly is not indebted for any of the items for alleged taxes set forth in said Amended Claim; that the above-named Debtor had not sold or distributed motor vehicle fuel during the months of January, May, June, July and September of 1945, or April and May, 1946, on which a tax had not been paid; and that all motor vehicle fuel sold by the Debtor during the aforesaid months was gasoline on which the motor vehicle fuel license tax had been paid to the State of California.

VI.

That during the months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood was doing

business as the Dependable Oil Company at 8132 Atlantic Boulevard, Bell, California.

VII.

That during the months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood, doing business as Dependable Oil Company, was engaged in the business of making sales of motor vehicle [64] fuel.

VIII.

That during the months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood doing business as Dependable Oil Company had neither applied for nor secured the distributor's license provided for by Article 1 of Chapter 4, Part 2, Division 2 of the Revenue and Taxation Code of the State of California.

IX.

That during the aforesaid months of January, May, June, July and September, 1945, and the months of April and May, 1946, said Arlie R. Lockwood doing business as Dependable Oil Company did nevertheless distribute the following amounts of motor vehicle fuel with respect to which the three cents per gallon tax had not been paid to the State of California as provided for by the Revenue and Taxation Code of the State of California:

Month Sold	Gallons Sold
January, 1945	5,149
May, 1945	73,156
June, 1945	216,539
July, 1945	139,597
September, 1945	17,787
April, 1946	20,988
May, 1946	2,920

X.

That the tax imposed by the Revenue and Taxation Code of the State of California upon the distribution of the aforesaid gallonage of motor vehicle fuel by said Arlie R. Lockwood has at no time been paid to the State of California as required by said Revenue and Taxation Code. [65]

XI.

That the aforesaid Amended Claim filed by the Controller of the State of California on or about October 17, 1946, is predicated solely upon the distribution of the motor vehicle fuel more fully described in Paragraph IX *supra*.

XII.

That none of the amounts set forth in the aforesaid Amended Claim of the Controller as due and owing to the State of California under the Motor Vehicle Fuel License Tax Law, Revenue and Taxation Code of the State of California, Division 2, Part 2, has been paid by said Arlie R. Lockwood to the State of California.

Conclusions of Law

And as conclusions of law from the foregoing facts, the Court finds:

I.

That said Arlie R. Lockwood, the Debtor herein, is indebted to the State of California for motor vehicle fuel license tax, penalties and interest in the amount of \$31,017.47 plus additional interest in the amount of \$71.42 for each and every month, or fraction thereof, commencing November 1st, 1946, to date of payment.

II.

That the amended priority tax claim of the Controller of the State of California in the amount of \$31,017.47 plus additional interest in the amount of \$71.42 for each and every month, or fraction thereof, commencing November 1st, 1946, to date of payment, is an allowable claim and should be paid by [66] E. A. Lynch, the duly appointed Receiver herein.

Dated this 23rd day of September, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed September 23, 1948.

[Endorsed] (Referee's Supplementary Certificate on Review and attached documents, pages 53 to 61 of this Printed Record): Filed Feb. 8, 1949, U.S.D.C. [67]

[Title of District Court and Cause.]

NOTICE OF MOTION

To: The State of California and to Howard S. Goldin, Deputy Attorney General:

You Will Please Take Notice that on the 24th day of November, 1947, at the hour of 10 o'clock a.m., in the courtroom of the Hon. Campbell E. Beaumont, United States District Court Judge, the undersigned will move the Court for leave to permit Harry A. Pines of Dechter, Hoyt, Pines & Walsh, as attorneys for the Receiver herein, to appear in connection with the petition for review of the debtor herein as amicus curiae, and in support of this motion will rely upon the files and records of this proceeding, and the points and authorities attached hereto.

Dated this 7th day of November, 1947.

DECHTER, HOYT, PINES &
WALSH,

By /s/ HARRY A. PINES,
Attorneys for the Receiver.

[Endorsed]: Filed November 10, 1947 (Reference).

[Endorsed]: Filed Nov. 12, 1947, U. S. D. C.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER TO PER-
MIT ADDITION OF REPORTER'S TRAN-
SCRIPT TO RECORD ON REVIEW

To the Controller of the State of California, Fred
N. Howser, Attorney General, Edward Sumner,
Deputy Attorney General, and to Walter C.
Durst, Attorney for the Bankrupt:

You and each of you will please take notice that
on Monday, the 28th day of February, 1949, at the
hour of ten o'clock a.m., E. A. Lynch, Trustee in
Bankruptcy, through his attorney, Harry A. Pines
of Dechter, Hoyt, Pines & Walsh, will make a mo-
tion in the court room of the Honorable Campbell
Beaumont, Judge of the United States District
Court, for an order permitting the Trustee to fur-
nish and add to the record, a reporter's transcript
of the proceedings which are the subject matter of
the pending review, and for such other and further
relief as may be proper in the premises.

This motion will be made upon the files and rec-
ords of these proceedings, the affidavit attached
hereto, and points and authorities attached hereto.

Dated: February 10, 1949.

DECHTER, HOYT, PINES &
WALSH.

By /s/ HARRY A. PINES,
Attorneys for E. A. Lynch,
Trustee.

Points and Authorities

Section 39-a(8) of the Bankruptcy Act provides that the Referee on review shall transmit to the Clerk of the District Court on review "a transcript of the evidence or a summary thereof."

The question involved on this review is whether or not there is evidence to support the Findings of Fact of the Referee. The Referee has heretofore stated that in the absence of a transcript it is impossible for him to prepare a summary of the evidence (referred to in the Referee's certificate as a "narrative statement of the evidence"). The Trustee has repeatedly offered to furnish such a transcript, but was refused permission to do so by the Referee. The Trustee has recently offered to furnish a transcript at the individual expense of some of the creditors, the cost of which is to be repaid only in the event of a successful culmination of the review, and the Referee has failed and refused to include such transcript in the supplementary certificate.

A review is impossible in this case without either a satisfactory summary of the evidence or a reporter's transcript of the testimony.

To enable a proper review, this Court should order the transcript to be furnished so that the record is adequate, as provided for in Section 39-a(8) of the Bankruptcy Act.

AFFIDAVIT OF HARRY A. PINES IN SUPPORT OF MOTION FOR ORDER TO PERMIT ADDITION OF REPORTER'S TRANSCRIPT TO RECORD ON REVIEW

State of California

County of Los Angeles—ss.

Harry A. Pines, being first duly sworn upon his oath, deposes and says:

That he is an attorney at law and a member of the firm of Dechter, Hoyt, Pines & Walsh, attorneys for E. A. Lynch, as Receiver of Arlie R. Lockwood, Debtor, and now attorneys for E. A. Lynch, as Trustee of Arlie R. Lockwood, Bankrupt.

That these proceedings were initiated as Debtor proceedings under Chapter XI of the Bankruptcy Act, and on October 4, 1946, the Controller of the State of California filed a claim for motor fuel license taxes in the sum of \$29,280.85. That on or about October 11, 1946, objections to the allowance of said claim were filed jointly by the Debtor and by E. A. Lynch, Receiver of the above-named Debtor. That these objections came on for hearing on the 22nd day of October, 1946, and said matter was continued and heard on four or five days subsequent thereto, extensive testimony being given both in support and in opposition to said claim of the State of California. It was the opinion of your affiant, as attorney with extensive experience in the practice of bankruptcy law, that the Referee had allowed the claim (which was in an amount sufficient to completely exhaust the estate), despite the fact

that the record was completely devoid of evidence to support the same. It was the opinion also of your affiant that the Referee had indulged in presumptions which are not properly invokable as against a Receiver or Trustee in Bankruptcy, and that a great injustice had been done to the unsecured creditors of the estate by such action. Consequently, on January 21, 1947, within five days of the Referee's order allowing the claim (Order dated January 16, 1947), your affiant as attorney for the Receiver filed a petition on behalf of the Receiver for instructions, seeking permission for the Receiver to file a petition for a review of said order. On January 21, 1947, the Referee made an order instructing the Receiver not to file a petition for review.

On January 25, 1947, the Debtor filed a petition for review, and the Receiver, because of his obligation to the creditors of the estate, and having been formally prevented by the Referee from seeking relief from the Referee's order, undertook an amicus curiae participation in the review proceedings. Although the petition for review was filed on January 25, 1947, the Referee encountered a very considerable amount of difficulty in preparing a certificate for review and it was not until November 3, 1947, that a certificate on review was filed by the Referee, which certificate lacked either a summary of the evidence or a reporter's transcript thereof, as required by Section 39-a(8) of the Bankruptcy Act. On many occasions between January 25, 1947, and November 3, 1947, and particularly between Janu-

ary 25th and July 31, 1947, your affiant as attorney for the Receiver, urged the Referee to permit the Debtor to expend the funds necessary for a reporter's transcript. On these occasions the Referee had at all times stated that he could not reconstruct the evidence in order to prepare a summary thereof, and the Attorney General's office, who represented the Controller of the State of California, was unable to assist the Referee in preparing such a summary of the evidence. Your affiant has at all times believed that the reason for same is because there is a lack of evidence, which is the very point in connection with the review. The Referee refused to permit money of the estate for the preparation of a reporter's transcript, but called upon the attorneys for the Debtor to pay such fee. The attorneys for the Debtor stated that they had no personal responsibility to pay for such transcript, and that the funds would have to come from the Debtor's estate, which expense the Referee refused to permit. Consequently, no reporter's transcript was available.

On July 10, 1947, the Controller of the State of California filed a petition for an order to show cause which did not name the Receiver as respondent, and under which an order to show cause was issued to the Debtor as to why his attorneys should not pay for the reporter's transcript. Because the Debtor did not have funds, and the attorneys had no responsibility thereunder, Debtor was unable to furnish such funds, and the Referee made an order on July 17, 1947, that the certificate on review would omit either a summary of the evidence or a re-

porter's transcript thereof. Both before and after this hearing, your affiant as attorney for the Receiver of the Debtor had informed the Referee that the estimated cost of a reporter's transcript, to-wit, the sum of approximately \$350.00, was available in the estate, and that the Receiver urged such expenditure, so that an adequate review of the question might be had and the creditors of this estate have their day in court. At all such times, the Referee refused to permit the Receiver to expend such funds. After the certificate was filed, your affiant, as attorney for the Receiver, filed on behalf of the Receiver, points and authorities on the review, in which he asked leave of the District Court to appear *amicus curiae* in support of the petition for review of the Debtor, in which points and authorities he directed attention to the failure of the certificate of the Referee to comply with Section 39 of the Bankruptcy Act, and complained of the fact that Findings of Fact had been requested below, that Findings of Fact were required in support of any order made on the contested issue, and that such review failed to include such Findings of Fact, and requested the opportunity of being heard on this matter, despite the restrictions placed on the Receiver by the Referee's refusal to permit the Receiver to participate in the review. On November 7, 1947, your petitioner gave notice to the State of California that on November 24, 1947, he would move the Court for permission to appear as *amicus curiae*. At the hearing on said motion, the Honorable Benjamin Harrison, District Judge, sitting in place and stead of Judge

Beaumont, granted the Receiver's permission to participate as *amicus curiae*. Since such date, the Debtor was adjudicated a bankrupt, and E. A. Lynch was appointed as Trustee in Bankruptcy. Consequently, the Trustee has inherited the mantle of the Debtor in connection with this review, and is now the moving party thereunder.

At the hearing before Judge Harrison, Judge Harrison remitted the matter to the Referee with directions to prepare adequate Findings of Fact and Conclusions of Law. Such order was made by Judge Harrison on January 5, 1948.

Once again, your affiant informed the Referee that proper Findings of Fact should depend upon an accurate consideration of the evidence, and that a reporter's transcript should be made available for such purpose. The Referee refused to permit the Trustee in Bankruptcy to expend the money for such a transcript.

On July 27, 1948, no Findings of Fact had yet been prepared, and your affiant wrote a three page letter to the Referee informing him that the progress of this estate was completely stymied by the failure of Findings of Fact not being prepared, that the Trustee should be permitted to purchase a reporter's transcript and complete the record so that the matter could be properly disposed of. On August 13, 1948, your affiant received a letter signed by the Honorable Hugh L. Dickson, Referee, which acknowledged receipt of your affiant's letter of July 27th, and in which the Referee stated "You are

hereby authorized to order a reporter's transcript of the hearing in the above entitled action." That within a day or two thereafter, your affiant communicated with Byron Oyler, the Court Reporter who had transcribed the testimony, and requested Mr. Oyler to prepare a transcript of the proceedings. That within two or three days thereafter, Mr. Oyler telephoned your affiant and informed him that the Referee had been contacted by the Attorney General's office, which office had dissuaded the Referee from permitting the Trustee to furnish a transcript of the testimony, and that the Referee had informed Mr. Oyler not to prepare such transcript.

It took the Referee, with the assistance of the Attorney General's office, between January 5, 1948, and September 6, 1948, in which to prepare Findings of Fact and Conclusions of Law. A copy of the proposed Findings of Fact and Conclusions of Law was served upon your affiant on September 7, 1948, and it was immediately apparent to your affiant that said Findings were not supported by the evidence, and your affiant carefully examined voluminous notes that he had taken during the hearing, and on September 9, 1948, sent a copy of proposed amendments to said Findings to the Referee, together with a letter, copy of which was sent to the Attorney General, in which the Trustee asked for an opportunity to be heard on these proposed amendments to the Findings.

Your affiant thereafter presumed that he would be notified of the date of the hearing on the same. On January 27, 1949, your affiant was informed by

Mr. Edward Sumner of the Attorney General's office, that the Referee had signed the Findings presented by the Attorney General's office on September 23, 1948. This was done without any notification to your affiant or to the Attorney General's office. Upon discovery of this fact, your affiant wrote to Referee Dickson on January 27, 1949, and informed the Referee that some of the interested creditors in this proceeding had offered to pay for a transcript, and suggested that in furnishing a supplementary certificate on review, that an opportunity be given to the Trustee to furnish such reporter's transcript at the expense of creditors.

Your affiant received no response to the last mentioned letter to the Referee, except that on February 9, 1949, he received a copy of the Referee's supplementary certificate on review, which makes no provisions for the addition of a reporter's transcript.

Your affiant has been furnished with the sum of \$350.00 by creditors interested in having an adequate record so that this matter may be properly determined by the District Court. Their day in Court would be denied, and possibly great injury to the creditors of this estate would be perpetrated, unless the certificate on review is supplemented by a reporter's transcript.

/s/ HARRY A. PINES.

Subscribed and sworn to before me this 9th day of February, 1949.

/s/ ADELE WALSH PARKER,
Notary Public in and for said County of Los Angeles, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed February 11, 1949.

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 28th day of February, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Campbell E. Beaumont,
District Judge.

[Title of Cause.]

For hearing motion of Trustee, filed Feb. 11, 1949, for order to permit addition of reporter's transcript to record on review; H. A. Pines, Esq., appearing as counsel for E. A. Lynch, Trustee; Edward Sumner, Deputy Att'y Gen'l for State of Calif., being present; Attorney Pines argues in support of motion; Attorney Sumner argues in opposition; Attorney Pines argues in closing;

Court grants motion and orders that transcript be prepared at expense of creditor Ben Hur Refining

Co. at said creditor's risk, without prejudice to said creditor's application for reimbursement, if Trustee is successful on review, and that reporter's transcript be attached to record on review.

[Title of District Court and Cause.]

MEMORANDUM ON REVIEW

The Bankrupt, Arlie R. Lockwood, was a gasoline broker; that is, he purchased gasoline from manufacturers and processors and resold it to distributors. The State Board of Equalization examined the bankrupt's sales records and from his books made an audit of purchases and sales. The Board discovered from bankrupt's own records that ostensibly he had sold much more gasoline than he had purchased.

Only one gasoline tax is paid to the State of California, irrespective of the number of transactions in which the product may be involved. At various hearings, and particularly before the Referee, the bankrupt testified he purchased no gasoline from any company other than a licensed manufacturer or processor and that all gasoline purchased by him as a broker was tax prepaid.

The State Board of Equalization, after completing its audit of the bankrupt's records, made a jeopardy assessment for gasoline tax on the gasoline sold by bankrupt in excess of the amount which his books indicated he had purchased. A claim was filed in the bankrupt estate, which claim was objected

to, and extensive hearings were had before the Referee.

The evidence disclosed bankrupt had employed five different bookkeepers and that his records were in a very unsatisfactory condition. Several of the auditors who made the investigation and who were called on to testify before the Referee were asked if they could identify any gasoline on which tax had not been paid. One investigator was asked:

“Now you have been unable to find where any of this gasoline, six millions gallons of gasoline he handled, was acquired by him without having paid the tax on it or bought it from someone who did pay the tax on it?”

“A. We have been unable to find any specific instance in which he received gasoline without paying the tax on it.

“.....

“And they were unable to find one load of gasoline that went to Mr. Lockwood’s plant that didn’t come from a refinery who was paying the tax to California?”

“A. That is true, I think. I know of no instance in which they found a load on which the tax had not been paid.”

From the evidence it could be safely ascertained that bankrupt sold a great deal more gasoline than his records indicated he had purchased from refineries and processors. When the bankrupt was unable to establish that the excess gasoline had been purchased from certain refiners and processors and the tax paid, the Board of Equalization assumed

that the gasoline sold by the bankrupt was gasoline on which tax had not been paid, and on that assumption the Board of Equalization made a jeop-
ardly assessment.

During the hearing before the Referee the State of California introduced evidence as to where the bankrupt might have obtained gasoline on which tax had not been paid. One of the witnesses testified:

“During the war there were four principal sources, from which many of our cases developed, and which resulted in determinations and assessments for tax collections as unlicensed distribution, the first one being motor vehicle fuel that was sold by licensed distributors, as taxed, to a Federal Government Agency, particularly the Military Department. * * * That was source No. 1.

“The second source was where gasoline was stolen directly from licensed distributors, through collusion by employees, tank truck drivers and other parties.

“The third case was illegal branding of petroleum products, special selling of those products, such as paint thinners.

“And the fourth was the case of the returned containers that were shipped back, 50-gallon barrels, by the Military to private contractors, who reclaimed the barrels and reconditioned them for again refilling. * * *

“Again, there was the draining of airplanes, which were crated for shipment, by private con-

tractors. Planes had to have sufficient gasoline in them for factory tests and to land the airplane. This was untaxed gasoline. These were drained and picked up by the contractor and put in containers, and they went in all directions with those particular trucks.”

The entire case for the State of California was summed up by the attorney for the Board of Equalization in his argument before the Referee. He said, in part:

“* * * I would like to point out that Mr. Lockwood has been given every opportunity, not only by the staff of the State Board of Equalization, but also by the Court in this proceeding, to explain the difference between the total sales, as shown by his books, and his total purchases, as shown by his books, and that he has failed to give any satisfactory explanation of that difference. I would therefore like to rely upon the well-accepted rule that there is a presumption that if evidence is not produced by a litigant which he can produce which would refute evidence showing liability, that such evidence is adverse and would support his adversary.”

In other words, the Board of Equalization has taken the position that when it can establish that a gasoline broker has sold gasoline in excess of the amount his records indicate was purchased and fails to satisfactorily explain the source of the extra gaso-

line, there is a presumption that it was untaxed gasoline.

The State of California apparently takes the position that it was not necessary to prove the gasoline in question was tax-free gasoline but that the burden was on the bankrupt to establish that the tax had been paid. The Board of Equalization investigators were unable to specifically designate any gasoline on which the tax had not been paid. The claim of the State rests solely upon failure of the bankrupt to establish that the gasoline was tax-paid gasoline; and because the bankrupt was unable to or refused to give evidence showing it was tax-paid gasoline, the Board of Equalization presumed it was gasoline on which the tax had not been paid.

“Where the party on whom the burden of proof rests has failed to make out a prima facie case, the absence of the adverse party, or his failure to testify raises no unfavorable inference against him.”

31 Corpus Juris Secundum 862

There is no question but that the burden of proof is on the State of California to establish that the gasoline in question was tax-unpaid gasoline.

“The inference arising from the failure of a party to testify does not take the place of evidence of material facts, or shift the burden of proof as to relieve the party on whom rests the duty of establishing a prima facie case.”

31 Corpus Juris Secundum 863

In the case of *Franklin v. Skelly Oil Co.*, 141

F.(2d) 568, plaintiff brought an action for damages which occurred as the result of an explosion of a butane gas system. At the trial plaintiff produced evidence of two, separate and independent probable causes, either of which might have been the efficient cause, and there was no evidence tending to show which of the two probably caused the explosion. The Court said, at page 571:

“* * * The mere choice of probabilities does not constitute evidence, but creates only conjecture and surmise on which a verdict of a jury cannot stand.”

In *Stimpson v. Hunter*, 125 NE 155; 7 ALR 1067, the defendant was sued on a dental bill for work performed for a minor son. At the trial the defendant and his son, who were in court, failed or refused to testify. Inasmuch as defendant and his son did not attempt to deny the testimony of the plaintiff, plaintiff attempted to raise a presumption that because they did not testify and deny the facts as alleged and proved this was evidence against them. To maintain the action it was necessary that the plaintiff establish that the work done was authorized by the father or that it was necessary for the health and comfort of the minor son and that the defendant negligently failed to provide his son a dentist to do the necessary work. The Court said:

“The failure of the defendant and his son to testify, although present in court, was not equivalent to affirmative proof of facts necessary to maintain the action. The defendant was

not bound to offer any evidence, unless and until evidence was offered by the plaintiff warranting the submission of the case to the jury.”

In *Parker v. Gulf Refining Co.*, 80 F. (2d) 795, the Court said:

“To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice it is not substantial. This has been repeatedly pointed out by this court.”

And again, in *Gulf Refining Co. v. Mark C. Walker & Sons Co.*, 124 F.(2d) 420:

“To submit to a jury a choice of probability is but to permit them to conjecture or guess, and where the evidence presents no more than such choice it is not substantial.”

In this matter the Board of Equalization has attempted to establish four different sources from which the bankrupt might have obtained untaxed gasoline. Under the decisions of the Federal Court, we do not believe that is sufficient. To allow the State's claim to stand would permit a claim based on conjecture or speculation.

The sole question presented on this review is whether the evidence supports the findings. The Referee found that Arlie R. Lockwood, doing business as Dependable Oil Co., distributed certain amounts of motor vehicle fuel with respect to which the 3-cents per gallon tax had not been paid to the State of California. We are of the opinion that

there is not sufficient evidence in the record to sustain this finding.

This matter is remanded to the Referee with instructions to disallow the claim of the State Board of Equalization.

Dated: September 28, 1950.

/s/ HARRY C. WESTOVER,

District Judge.

[Endorsed]: Filed October 2, 1950.

In the District Court of the United States, in and for the Southern District of California, Central Division.

In Bankruptcy No. 44,536-HW

In the Matter of
ARLIE R. LOCKWOOD,

Bankrupt.

FINDINGS OF FACT AND JUDGMENT ON
PETITION FOR REVIEW AND ORDER
THEREON

The petition for review of the Referee's order dated January 16, 1947, allowing the amended claim of the State of California as a prior lien claim for taxes in the sum of \$31,212.08 together with additional interest amounting to \$71.50 for each and every month, or fraction thereof, which order was amended nunc pro tunc on September 3, 1948, by the substitution of the figure of \$31,160.31 in lieu of \$31,212.08 and by the substitution of the figure of

\$71.42 in lieu of \$71.54, was submitted to this Court upon the Referee's Certificate on Review dated November 3, 1947, the Referee's Supplemental Certificate on Review dated January 26, 1949, the reporter's transcript of the proceedings before the Referee which took place on October 22, October 28, November 1, November 27 and December 20, 1946, and the briefs and memoranda filed herein by Fred N. Howser, Attorney General, and Edward Sumner and Daniel N. Stevens, Deputies of said Attorney General, in behalf of the Controller of the State of California, and by Dechter, Hoyt, Pines & Walsh and Harry A. Pines, as attorneys for E. A. Lynch, formerly receiver and now Trustee in Bankruptcy of the above-entitled bankrupt, and by Paul Magasin and Cobb and Uteley, Attorneys for Arlie R. Lockwood as debtor, under Chapter XI proceedings, and the Court having taken the matter under submission, and having on September 28, 1950, filed a Memorandum on Review holding that there is not sufficient evidence in the record to sustain the findings of the Referee, which said Memorandum on Review was entered on October 2, 1950,

It Is Ordered that the Findings of Fact and Conclusions of Law and order of the Referee be and the same are hereby set aside and vacated, and being fully advised of the evidence in the record of this case, the Court makes Findings of Fact and Conclusions of Law as follows, to wit:

Findings of Fact

I.

That during the months of January, May, June,

July and September of 1945 and the months of April and May, 1946, Arlie R. Lockwood, the above-named bankrupt, was a broker of motor vehicle fuels, duly licensed as a broker under the Motor Vehicle Fuel License Tax Act of the State of California, and was engaged in business in such capacity as the Dependable Oil Company at 8132 Atlantic Boulevard, Bell, California.

II.

That during the time mentioned in Finding No. I, the said Arlie R. Lockwood was engaged in the business of selling motor vehicle fuel.

III.

That certain sales invoices found among the records of the said Arlie R. Lockwood indicate sales of gasoline during the months described in Finding No. I in excess of the number of gallons reflected by reports regularly filed by the said Arlie R. Lockwood with the Board of Equalization of the State of California, purporting to be an accurate record of the sales made by him as a licensed broker of motor vehicle fuel during the such monthly periods. That the number of of excess gallons of gasoline so reflected by such sales invoices are as follows:

Month	Gallons
January, 1945.....	5,149
May, 1945.....	73,156
June, 1945.....	216,539
July, 1945.....	139,597
September, 1945.....	17,787
April, 1946.....	20,988
May, 1946.....	2,920

IV.

That the Motor Vehicle Fuel License Tax Act of the State of California imposes but one tax upon the sale or distribution of motor vehicle fuel, and that resales of said motor vehicle fuel, irrespective of the number thereof, are not subject to further levy of motor vehicle fuel tax.

That there is no evidence that the motor vehicle fuel purchased and sold by said Arlie R. Lockwood during the periods of time described in Finding No. I was not purchased from licensed manufacturers or distributors who had already paid the motor vehicle tax on such fuel.

V.

That during the month of July, 1945, the said Arlie R. Lockwood, by mistake, blended 792 gallons of kerosene with pressure appliance fuel, thus converting the same to motor vehicle fuel and incurring a tax under the Motor Vehicle Fuel Tax Act in the sum of \$23.76.

That Arlie R. Lockwood during the periods of time described in Finding No. I incurred no motor vehicle fuel tax liability to the State of California, other than the sum of \$23.76.

Based Upon the Foregoing Findings of Fact, This Court Makes the Following

Conclusions of Law

I.

Only one motor vehicle fuel tax is paid to the State of California, irrespective to the number of

transactions in which the product may be involved.

II.

Seven hundred ninety-two (792) gallons of motor vehicle fuel inadvertently blended by the bankrupt represents the total amount of motor vehicle fuel sold or handled by the bankrupt upon which motor vehicle fuel tax had previously not been paid.

III.

The State of California is entitled to the allowance of a claim in the amount of \$23.76, together with interest thereon.

IV.

That other than the allowance of the claim of the State of California in the amount of \$23.76, the claim of the State of California should have been disallowed by the Referee in Bankruptcy.

Based Upon the Foregoing Findings of Fact and Conclusions of Law, It is Hereby Ordered, Adjudged and Decreed that the order of the Referee, Hugh L. Dickson, dated January 16, 1947, as amended nunc pro tunc under date of September 3, 1948, the effect of which was to allow the claim of the State of California as a prior tax claim and lien in the sum of \$31,160.31 together with interest thereon, be and the same is hereby reversed.

It Is Further Ordered, Adjudged and Decreed that this matter be and it hereby is remanded to the Honorable Hugh L. Dickson, Referee in Bankruptcy, and the said Referee is hereby directed to enter an order disallowing the claim of the State

of California in the amount of \$31,160.31, and allowing the same only for the amount of \$23.76, together with such interest thereon as is properly allowed by law.

Dated: This 3rd day of Nov., 1950.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

Approved As To Form.

DECHTER, HOYT, PINES &
WALSH.

By /s/ HARRY A. PINES,
Attorneys for E. A. Lynch, Trustee in Bankruptcy
of the Above Entitled Bankrupt.

Receipt is hereby acknowledged:

FRED N. HOWSER,
Attorney General.

By /s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for Controller
of the State of California, Claimant.

Judgment entered Nov. 3, 1950.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 3, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Controller of the State of California, claimant in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Honorable Harry C. Westover entered on the 3rd day of November, 1950, on Petition for Review of Referee's Order allowing taxes claimed by said Controller of the State of California under the Motor Vehicle Fuel License Tax Act of the State of California, in the sum of \$31,160.31, plus interest in the sum of \$71.42 per month, or fraction thereof, after December 31, 1946 to date of payment.

Dated: November 28, 1950.

FRED N. HOWSER,
Attorney General,

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for Controller
of the State of California.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 29, 1950.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents, that the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the

State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto E. A. Lynch, Trustee in Bankruptcy for Arlie R. Lockwood, Bankrupt in the above-entitled matter, in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00) to be paid to said E. A. Lynch, Trustee in Bankruptcy for Arlie R. Lockwood, his successors, assigns, or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successor and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, The Comptroller of State of California is about to take an appeal to the United States Court of Appeals for the Ninth Circuit from an order on petition for review, made and entered November 3rd, 1950, by the United States District Court for the Southern District of California, Central Division, in the above-entitled action.

Now, Therefore, if the above named Appellant, The Comptroller of State of California, shall prosecute said appeal to effect and answer all costs which may be adjudged against him if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Princi-

pal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 28th day of November, 1950.

**FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,**

By /s/ ROBERT HECHT,
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ EDWARD SUMNER,
Attorney.

Approved this day of, 1950.

.,
Judge.

State of California

County of Los Angeles—ss.

On this 28th day of November, 1950, before me, Theresa Fitzgibbons, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Robert Hecht, known to me to be the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the Corporation that he executed the within instrument, and acknowledged to

me that he subscribed the name of the Fidelity and Deposit Company of Maryland thereto and his own name as Attorney-in-Fact.

[Seal]: /s/ THERESA FITZGIBBONS,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires May 3, 1954.

[Endorsed]: Filed November 29, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To The Clerk of the Above Entitled Court:

Appellant, Controller of the State of California, claimant in the above-entitled matter, through counsel, hereby designates the entire record before the District Court, including all papers, pleadings and other documents certified to the District Court by the Honorable Hugh L. Dickson, Referee in Bankruptcy, with his Certificate on Petition for Review of his Order of January 16, 1947, allowing the claim of the Controller of the State of California for taxes due from the bankrupt herein under the California Motor Vehicle Fuel License Tax Law in the sum of \$31,160.31, plus interest in the sum of \$71.42 per month, or fraction thereof, after December 31, 1946 to date of payment.

Specifically, the record designated should include the following:

1. The Referee's Certificate on Review filed with the Clerk of this Court on November 4, 1947;
2. The various documents transmitted with the aforesaid Certificate on Review, as specifically itemized on pages 6 and 7 of that Certificate;
3. The Notice of Motion dated November 7, 1947 by the attorneys for the receiver herein for leave to appear in connection with the aforesaid Petition for Review and the Points and Authorities filed with said Notice;
4. The "Points and Authorities on Review" filed by the attorneys for the debtor and the receiver, respectively, in November, 1947;
5. The Referee's Supplementary Certificate on Review filed with the District Court in January, 1949, and the documents transmitted therewith as specifically described on page 2 of said Certificate;
6. Notice of Motion for Order to permit addition of Reporter's Transcript to record on review, dated February 10, 1949;
7. The Order of Judge Beaumont permitting the addition of the aforesaid Reporter's Transcript;
8. Transcript of the proceedings before the Honorable Hugh L. Dickson on the hearing of Objections to the allowance of the aforesaid claim of the Controller of the State of California;

9. The Memorandum Decision of the Honorable Harry C. Westover on the aforesaid Petition for Review;

10. The Findings of Fact, Conclusions of Law and Order (Judgment) on Petition for Review signed by the Honorable Harry C. Westover and entered November 3, 1950 in Judgment Book No. 69, page 15.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Court and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above-entitled court transmit all the original papers in the file dealing with the action or the proceedings in which the appeal has been taken, including the Notice of Appeal and this Designation.

Dated at Los Angeles, California, this 28th day of November, 1950.

FRED N. HOWSER,
Attorney General.

/s/ EDWARD SUMNER,
Deputy Attorney General, Attorneys for Controller
of the State of California.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 29, 1950.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy, No. 44,536-B

In the Matter of
ARLIE R. LOCKWOOD,

Bankrupt.

Before: The Honorable Hugh L. Dickson, Referee
in Bankruptcy.

HEARING ON OBJECTIONS OF DEBTOR
AND RECEIVER TO CLAIM OF THE
CONTROLLER OF THE STATE OF CALI-
FORNIA, AND L. A. McKEE, CHIEF,
DIVISION OF TAX COLLECTION, CON-
TINUED FROM OCTOBER 17, 1946

Appearances:

For Receiver Lynch:

DECHTER, HOYT, PINES &
WALSH, By
HARRY A. PINES, ESQ.

For the Debtor:

COBB & UTLEY, By
FRANCIS COBB, ESQ.

For the State of California, Claimant:

ROBERT W. KENNY, ESQ.,
Attorney General, By

DANIEL N. STEVENS, ESQ.,
Deputy Attorney General.

For Elm Oil Company and Palomar Refining Company:

FORSTER & GEMMILL, By
JOHN G. GEMMILL, ESQ. [1*]

Tuesday, October 22, 1946. 2 P.M.

The Referee: In the matter of Arlie R. Lockwood.

Mr. Cobb: In that matter, your Honor, we filed objections to the Controller's claim and we think that should be taken up first in that the successful presentation of a plan of arrangement depends upon the determination of that obligation. We claim there is no sum due. The State is claiming some \$30,000, 50 per cent of which is penalties. We filed the original objections and noticed it for hearing. It was continued until today at the request of the Attorney General. In the meantime they filed an amended claim. I have drawn written objections to the amended claim, so that the record will be straight, but I have been waiting for Mr. Lynch to arrive to sign it. If I may have time to have that done now I will file it.

The Referee: If I should rule adversely to the State and they should appeal it, your plan will be way in the future, won't it?

Mr. Cobb: That is something we will have to meet when it comes around.

Mr. Pines: I might say this, from the position of the Receiver, the objections of the debtor to which the Receiver has joined makes it largely a factual

situation. If the evidence is such as the Receiver indicated to me and the Board of Equalization will admit it then there's no tax [2] due and owing. It all depends on whether there were taxable transactions, where there was distribution of gasoline on which no taxes were paid. It is either one or the other. The Receiver wants the chips to fall where they may.

The Referee: It will be refreshing to have that. All right, sir.

Mr. Stevens: If the Court please, I would like to offer in evidence certified copies of the four determinations issued by the State Board of Equalization upon which the amended claim of the State Controller is based.

The Referee: What is the amount of your amended claim?

Mr. Stevens: It is 31,000.

The Referee: 31,017.47 plus interest at 71.42?

Mr. Stevens: The additional interest has not yet accumulated. It will not accumulate until after November 1st.

The Referee: Have you seen those documents?

Mr. Cobb: Yes, your Honor. At this time we object to their introduction on the ground it appears on the face of them they are what is known as a jeopardy assessment, not based on any factual situation.

The Referee: Mr. Langharn had a case where they made a jeopardy assessment on a Japanese who planted some seeds in the spring. They said he must have earned at least \$25,000 the first year. I

will have to sustain the objection until you show some basis for levying this assessment. [3]

Mr. Stevens: I would like to refer briefly to the Revenue and Taxation Code.

Mr. Pines: So that the record is clear, the Receiver wishes to join in the objection.

The Referee: All right. I have no doubt but what you have a right to make a jeopardy assessment, but I will not accept this in evidence until you have shown me there is some tax due. You gentlemen can sit in an office and say, "Bill Jones must have made two million dollars," and put on a jeopardy assessment. You better put on your evidence and let us see what this fellow did for which you say you had a right to tax him on.

Mr. Stevens: At this time I want to object to the introduction of any evidence in this court going into the amount of this particular tax, on the ground this Court has no jurisdiction under any provision of the Bankruptcy Act to make a determination on that point.

The Referee: Your objection is very promptly overruled. I don't know where you would go if I had no authority to handle these bankruptcy estates.

Mr. Stevens: This is a Chapter XI proceeding, your Honor, and Section 64(a)4 does not apply in this proceeding.

The Referee: That is bankruptcy the same as any other case. The objection is overruled. Let's get down to the proof that this man owes you something.

Mr. Stevens: Do I understand your Honor to be

taking [4] the position at this time then that the finding of our prima facie case does not even require the objecting party to carry the burden of proof here?

The Referee: I will insist that you show what transactions this man had which entitled the State to put a tax on his business. You certainly have the facts or you wouldn't have levied this assessment.

Mr. Stevens: Frankly, your Honor, I don't believe you have the authority to make a determination as to the validity of our claim, particularly in the absence of any showing by the objecting parties here which would contradict the prima facie case made out by our claim.

The Referee: I differ with you. If I am wrong there is a higher court to tell us who is right. I have the first chance to rule on these matters, and if I make the wrong decision you have a plain, speedy and adequate remedy for review, and then you can go to the Circuit Court. Are you prepared to proceed and prove any operations on the part of Lockwood which would entitle the State to tax him?

Mr. Stevens: Yes, your Honor, I am prepared to proceed.

The Referee: Let's go.

Mr. Stevens: I am just trying to make up my mind whether I want to put the State in the position of proceeding in view of your Honor's ruling.

The Referee: You are the man to determine that. [5]

Mr. Stevens: I would appreciate it if your Honor would give me a couple of minutes to make up my mind in that regard.

The Referee: If you want me to we will take a 10 minute recess so that you can deliberate in quiet.

Mr. Stevens: Yes, I would like to do that, if your Honor please.

The Referee: All right, sir.

(A short recess was taken at this point.)

Mr. Stevens: I am ready, your Honor. In order that the Court will be fully informed I would like to direct your Honor's attention to Section 7730 of the Revenue and Taxation Code of the State of California.

The Referee: Yes, sir.

Mr. Stevens: It reads as follows: "In the suit a copy of the jeopardy determination certified by the secretatry of the Board or by the Controller, shall be prima facie evidence that the licensed distributor is indebted to the State in the amount of the license tax, penalties and interest computed as prescribed by Section 7706."

The Referee: Now tell me how does Section 7706 tell you to compute it, so that I will be thoroughly informed on this matter?

Mr. Stevens: Section 7706 reads: "All jeopardy determinations, including those made under Section 7704, exclusive of penalty, shall bear interest at the rate of $\frac{1}{2}$ of [6] 1 per cent per month, or fraction thereof, from the first day of the second calendar month following the close of the monthly period

for which the amount or any portion thereof should have been returned until the date of payment.”

The Referee: Is there any *modus operandi* by which you determine the amount of tax due?

Mr. Stevens: Yes, your Honor, there is.

The Referee: Is that the same that you use for a jeopardy assessment?

Mr. Stevens: This is a jeopardy determination to which I am referring.

The Referee: I realize that, but how do you arrive at the amount of tax due? Don't you have some books or records or figures or something to go on?

Mr. Stevens: Yes, we do.

The Referee: In other words, you cannot sit in your office and say, “Well, I assume this gentleman should pay \$10,000 in taxes.” You must have some figures to base it on, is that correct?

Mr. Stevens: That is correct, your Honor. The article under which this particular levy was made is Article IV.

Mr. Cobb: What section?

Mr. Stevens: Part 2 of Division 2 of the Revenue and Taxation Code, beginning with Section 7726 to and including Section 7732. Section 7726 provides, “If any person becomes [7] a distributor without first securing a license, the license becomes immediately due and payable on account of all motor vehicle fuel distributions made by him.”

Section 7727 provides the method in which that shall be determined, and reads, “The Board shall forthwith ascertain as best it may the amount of

the distributions and shall determine immediately the license tax on the amount, adding to the license tax a penalty of 100 per cent of the amount of the tax, and shall give the unlicensed distributor notice of this determination as prescribed in Section 7493. Provisions of Sections 7699 and 7700 shall be applicable with respect to the finality of the determination and the right of the unlicensed distributor to petition for a redetermination."

Section 7699 provides, "If the amount of tax, interest, and penalty specified in the jeopardy determination is not paid within 10 days after service upon the distributor of notice of the determination, the determination becomes final, unless a petition for redetermination is filed within the 10 days, and the delinquency penalty and interest provided in Article II of this Chapter shall attach to the amount specified."

Section 7700, which provides for the petition for redetermination, reads as follows: "The distributor against whom a jeopardy determination is made may petition for the redetermination thereof pursuant to Article 3.5 of this [8] chapter. He shall, however, file the petition for redetermination with the Board within 10 days after the service upon him of notice of the determination. The distributor shall also within the 10-day period deposit with the Board such security as it may deem necessary to insure compliance with this part."

The Referee: That is all very interesting, but can you read me a section that gives me some idea

as to how you determine the amount of tax to levy on a man?

Mr. Stevens: The only provision with regard to an unlicensed distributor is that contained in Section 7727, which reads, "The Board shall forthwith ascertain as best it may the amount of the distributions and shall determine immediately the license tax on the amount, adding to the license tax a penalty of 100 per cent of the amount of the tax, * * *"

The Referee: What do you construe those words to mean "as best it may"? Does he have to make an examination of any records or anything?

Mr. Stevens: That is the only way I have known it to be done.

The Referee: Then put on your proof as to what you found. That is what I want. In one of these assessment you say in January this man sold 4,349 gallons. Now prove that. You say in July he sold 138,805 gallons. Let's see where you get that information.

Mr. Stevens: If the Court please, I am not trying to [9] be impudent, but in view of Section 7730, to which I referred, I am again offering certified copies of the notices of determination in evidence in this proceeding.

The Referee: I will make the same ruling without attempting to be impertinent. I am firmly of the opinion that, having said this party owes you money for taxes, you should prove it.

Mr. Stevens: Will the Court mark the proposed exhibit?

The Referee: I will mark it for identification.

Mr. Stevens: So that it may be made a part of the record.

The Referee: I will do that, yes, sir.

Mr. Stevens: How will that be designaated, your Honor?

The Referee: I will mark it Claimant's Exhibit No. 1. You are the tax claimant here so we will mark it Claimant's Exhibit No. 1 for identification. Mr. Laugharn had this same type of case and he made the same ruling I am making now. It was reviewed and went to the Ninth Circuit, and they sustained it as against the United States Government. I am sure they would not show any preferential treatment no matter who the taxing authority was. It was held that it was incumbent upon the taxing authority to show the records, where they got these figures, and upon what they based their claim.

(The documents were marked Claimant's Exhibit 1 for identification.) [10]

Mr. Stevens: I would like at this time to call Mr. Harold S. Williams to the stand.

HAROLD S. WILLIAMS

called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, will you state your name?

A. Harold S. Williams.

Q. What is your occupation?

A. Supervising Investigator, State Board of Equalization.

(Testimony of Harold S. Williams.)

Q. I show you a photostatic copy of what is designated "Notice of Determination Motor Vehicle Fuel License Tax, State Board of Equalization, Form 60," dated August 6, 1946, at the top of which opposite the printed words "License Number" appears the typewritten number B-1385, and ask you if you can identify that document?

A. This is a certified copy, or rather a photostatic copy of an assessment that I had in my possession.

Q. When did you receive that in your possession?

A. About the 10th of August, I believe.

Q. Of this year? A. Of 1946.

Q. What did you do with that notice of determination? [11]

A. I endeavored to contact Mr. Lockwood personally to serve this notice of determination upon him.

Q. Did you do so? Did you serve it upon him?

A. I did finally on August 3, 1946. He finally returned from Oregon and I served it on him at that time personally.

Mr. Stevens: That is all.

The Referee: Any cross-examination, gentlemen?

Mr. Cobb: Yes, your Honor, one question.

Cross-Examination

By Mr. Cobb:

Q. You don't know anything about the document

(Testimony of Harold S. Williams.)

other than you received it from some officer to serve?

A. I received it from some officer to serve.

Mr. Cobb: That is all.

Mr. Stevens: I have nothing further from Mr. Williams.

The Referee: All right, Mr. Williams. Call your next witness.

Mr. Stevens: I would like to call Mr. Akers to the stand.

JOSEPH C. AKERS

called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your full name? [12]

A. Joseph C. Akers.

Q. What is your occupation?

A. I am an attorney and referee employed by the State Board of Equalization.

Q. Are you familiar with the notices of determination issued by the State Board of Equalization for motor fuel license tax assertedly due from the debtor in this proceeding?

A. I have seen copies, yes, our office copies.

Q. Did you have a conversation with the Receiver for the debtor in this proceeding, Mr. Lynch?

A. I did.

Q. On September 5, 1946?

(Testimony of Joseph C. Akers.)

A. I did. My first conversation with Mr. Lynch on this matter was on September 3rd, and we were in communication daily thereafter during that week.

Q. Did you have any conversation with Mr. Lynch as to the right of the debtor or the Receiver to file a petition for redetermination of the determination of August 6, 1946, against Mr. Lockwood in the amount of \$27,799.22? A. I did.

Q. What did you say and what did he say?

Mr. Cobb: To which we object on the ground it would be immaterial. The right to file a determination is given by statute. It is not required under the Bankruptcy Act. After bankruptcy had intervened the right to file a claim [13] is required under the bankruptcy section. All taxing agents are required to file claims under Section 57(n) and any conversation he would have with the Receiver about going before him as Referee to have this matter determined would not be binding on any creditors or this court.

The Court: I think that is true. Objection sustained.

Mr. Stevens: I will offer to prove by this witness that in response to my question he would testify that in this conversation he advised Mr. Lynch that he had until the evening of September 5, 1946, within which to file with the State Board of Equalization a petition for redetermination of the last determination of August 6, 1946, in the amount of \$27,799.22.

(Testimony of Joseph C. Akers.)

Mr. Pines: Did I understand you to say he had until September 5th?

Mr. Stevens: That is correct.

Mr. Pines: And this was on September 5th, this conversation?

Q. (By Mr. Stevens): Was it September 5th or September 3rd, Mr. Akers?

A. My conversation in which I advised Mr. Lynch of that fact was on September 3rd. September 3rd was 10 days after the service which the previous witness testified to. Claimant's Exhibit No. 1 for Identification I believe refers to September 5th as the date of its becoming final. [14]

The Referee: Is that all of your offer, Mr. Stevens?

Mr. Stevens: That is all I am offering on that particular conversation, if the Court please.

The Referee: The offer is denied.

Q. (By Mr. Stevens): At or about the same time did you have a conversation with Mr. Francis Cobb, attorney for the debtor in this proceeding?

A. I did.

Q. What was stated in that conversation?

A. Mr. Cobb called our office late in the afternoon of September 3rd, stating, as nearly as I now recall our conversation over the telephone, that he understood the Board asserted a lien claim against Mr. Lockwood as debtor in this proceeding in the amount of some \$27,000. He called my attention to the fact that an order had been issued by your Honor about the 30th of August in which Mr. E. A.

(Testimony of Joseph C. Akers.)

Lynch was appointed Receiver in this matter, that that would in his opinion supersede any right of the agents of the State Controller to seize any property of Mr. Lockwood; that he felt the lien of the State, being one provided by statute, came under Section 67(c) of the Bankruptcy Act and needed to be perfected by the filing. I believe the language of that statute is "Notice thereof with the Court." I did not agree with Mr. Cobb in that interpretation of the State statute, the Motor Vehicle Tax License Law. I advised him so.

Prior to concluding our conversation I said, [15] "You know that a jeopardy determination has been issued by the Board against Mr. Lockwood which differs from an ordinary determination only in that that if a petition for redetermination is desired"—which is the distributor or against whom it is issued, and I believe I was working then with the date of September 3rd in mind—"you have until midnight tonight to get something off in the mail to Sacramento postmarked at least September 3rd in the form of a petition for redetermination of this matter."

Mr. Cobb advised me that he felt that in view of the fact that a debtor proceeding had been commenced the provisions of the Bankruptcy Act applied: that he thought the Referee's Court was the only court that he should go before, and that he did not desire to submit Mr. Lockwood to the jurisdiction of the Board by filing a petition for redetermination with the Board. That in substance I believe

(Testimony of Joseph C. Akers.)

is the conversation, except we agreed to keep in touch with each other regarding subsequent developments.

Mr. Cobb: We move to strike on the ground it is irrelevant and immaterial and has no bearing upon the claim or any of the issues involved by the objection to the claim.

The Referee: Your motion will be granted.

Mr. Stevens: That is all I have to ask of this witness.

The Referee: Any questions?

Mr. Cobb: No. [16]

The Referee: All right, sir, that is all.

Mr. Stevens: At this time, in view of the identification of the second photostat in Claimant's Exhibit 1 for Identification, I would like to offer that particular determination in evidence.

The Referee: Your offer is denied. You haven't proved any tax yet. You have simply proved the claim that he owed. Now prove that he owed you.

Mr. Stevens: May it be stipulated, Mr. Cobb and Mr. Pines, that none of these determinations of the State Board of Equalization for motor vehicle fuel license tax, copies of which are attached to the amended complaint of the Controller of the State of California now on file, have been paid?

Mr. Cobb: I will stipulate that no tax has been paid to the State of California, the State Board of Equalization, by the debtor herein, and as a distributor—since we do not contend he was a distributor—and that as a broker he has filed returns and paid

taxes in accordance with those returns; but I am not willing to lay the foundation for the introduction of this document by stipulation. That is the point I am afraid of.

Mr. Stevens: Then I will do it this way.

The Referee: I will say very frankly, counsel, that document does not prove anything. You have got to bring in the facts and figures here. That is a mere summary. [17] Somebody somewhere somehow made up his mind that the man owed that amount of taxes; he wrote it out on a piece of paper and set the figures out. Now I want you to show by some books and records how you arrived at the conclusion that the man sold that amount of gasoline, otherwise I am not going to allow this claim, that is all there is to it. You might as well get my position clear in your mind right now. A tax claim is like any other claim. It has to be proved. Have I made myself clear?

Mr. Stevens: I think you have, your Honor, but just to make sure I will ask your Honor if by your ruling you mean that the——

The Referee: I mean very definitely——

Mr. Stevens (Continuing): ——that Mr. Lockwood, the debtor in this proceeding, and Mr. Lynch, the Receiver in this proceeding, do not have to make any proof in support of their objections to this claim?

The Referee: That is my ruling exactly. You have to show that they owe you some money; otherwise I will not allow the claim.

Mr. Stevens: Then I would like to finish making my record.

The Referee: Go right ahead.

Mr. Stevens: I will call Mr. Lynch to the [18] stand.

E. A. LYNCH

called as a witness on behalf of the claimant, being first duly sworn, testified as follows.

Direct Examination

By Mr. Stevens:

Q. Your name is E. A. Lynch?

A. That is right.

Q. You are the Receiver of Arlie R. Lockwood, the Debtor? A. Right.

Q. Have you seen the originals of the four assessments, photostatic copies of which are attached to Claimant's Exhibit 1 for Identification?

A. The originals of these?

Q. Yes.

A. I don't think so. They are filed here in the court, no doubt. I may have copies of them in my file.

Q. They were not filed in court. We filed a claim with copies attached.

A. I have some claims in my file in my office, but I can't identify these from that. I don't recall these specifically.

Q. You have not seen these. You don't recall any one of these?

(Testimony of E. A. Lynch.)

A. Not right now. No, I can't say that I do. Let me see what the amounts are. [19]

These are dated back to August 6th. The only ones that I recall at the moment are some that came to my office in the past 10 days.

Q. Would those be the first, second and third—or the first, third and fourth?

A. I wouldn't know unless I would see my files.

Q. You are in possession of all of the records of the debtor, are you, Mr. Lynch?

A. There they are right over there (pointing). Do I understand this was served on me?

Q. I believe they were served on Arlie R. Lockwood.

A. Well then I didn't see them.

Q. You would say that you do not have them in your possession?

A. Not that I know of. That is not a proof of debt form. I don't recall seeing those, no.

Q. This is not a proof of debt.

A. I may be wrong.

Q. This is a notice of determination.

A. I don't recall seeing those right now. Mr. Lockwood may have had them, but I didn't pay any attention to them.

Q. Have you paid any of these assessments to the State Controller? A. No.

Mr. Stevens: That is all. [20]

(Testimony of E. A. Lynch.)

Cross-Examination

By Mr. Cobb:

Q. Mr. Lynch, you have not operated as a distributor of gasoline since your appointment as Receiver, have you? A. Distributor of gasoline?

Q. Yes.

A. No, only the retail station for about two or three days there.

Q. Has the State Board spent any time in examining the books and records since this receivership?

A. Oh, yes.

Q. How many men and how long have they worked in that connection?

A. I see two of them now, and I think two others—probably four auditors were going over the records.

Q. For about how many days?

Mr. Stevens: I object to this line of questioning and move to strike the answers on the ground it is going outside of the scope of the direct examination.

The Referee: The motion is denied. I am here to hear the truth and the facts. I don't know whether it is strictly within the scope of cross-examination or not, but I am looking for the truth always. The motion is denied. I issued a subpoena a day or so ago to the custodian of the State in order to have all records brought in here. What did you have me do that for? [21]

Mr. Stevens: So that after the objecting parties

(Testimony of E. A. Lynch.)

in this case had put on their case we would put on our rebuttal.

The Referee: You had better put on yours first.

Mr. Cobb: We don't know the grounds of the objections.

The Referee: That is true. You wouldn't know where to start. It is asking you to prove the negative.

Mr. Cobb: That is right.

The Referee: Which I never did learn was the law, unless you can teach it to me now. You affirm that they owe you. I say prove it. Then it is up to them to show by denial that they don't owe it. I am not going to revolutionize the whole system of jurisprudence to suit some taxing authority. You asked that the books be brought in here, now use them. You had your auditors working on them. Put your auditors on and let's find out about it. That is my position, gentlemen.

Mr. Stevens: I have no further questions.

Mr. Cobb: That is all.

The Witness: They were there five or six days altogether, maybe longer than that. I didn't keep track of that.

Mr. Cobb: That is all.

The Witness: They were coming and going. Is that all?

Mr. Cobb: That is all.

Mr. Stevens: I have no further questions of Mr. Lynch.

The Referee: Call your next witness. [22]

Mr. Stevens: I would like to call Mr. Lockwood to the stand.

ARLIE R. LOCKWOOD

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Lockwood, do you recognize the notices of determination attached to Claimant's Exhibit 1 for Identification?

A. I only recognize one in detail. The rest of them I assume are copies of what I received in the mail the past few days.

Q. Have you paid any of these determinations?

A. Well, I don't know, because in the regular course of my business I assumed that includes sales tax and other taxes they have been auditing for.

Q. If you will examine these four notices of determination again, they are for Motor Fuel License Tax.

A. No. Then I haven't paid any of them.

Mr. Stevens: That is all.

Cross-Examination

By Mr. Cobb:

Q. Mr. Lockwood, did you at any time act as distributor of motor fuel under the Motor Vehicle Fuel License Act of the State of California? [23]

A. No.

(Testimony of Arlie R. Lockwood.)

Q. You were a broker, were you?

A. That is correct.

Q. As a broker you buy the gasoline tax paid or unpaid?

A. Tax paid. That is the only way in which I can buy gasoline.

Mr. Cobb: That is all.

Redirect Examination

By Mr. Stevens:

Q. Mr. Lockwood, did you engage in the Black Market sales of gasoline during the period of gasoline rationing?

Mr. Pines: We object, your Honor.

Mr. Cobb: We also object on the ground it is incompetent, irrelevant and immaterial.

The Referee: Sure. Objection sustained.

Mr. Stevens: I would like to make a statement.

The Referee: I will not let you ask this man that type of question and have it answered.

Mr. Stevens: All right.

The Referee: If you say he did, then prove it. You have a peculiar idea of how to present a case, it seems to me.

Mr. Stevens: Thank you.

The Referee: You do have a very novel way.

Mr. Stevens: Thank you. [24]

The Referee: The objection is sustained and the witness is directed not to answer that question.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: All right. Mr. Williams and Mr. Lyles, will you come up here?

Mr. Cobb: Are you finished with this witness?

Mr. Stevens: No, I am not. Your Honor, we feel in view of the testimony of this witness which has been given before your Honor in support of the objections filed by Mr. Lockwood as the Debtor and by Mr. Lynch as Receiver that we should proceed to put on our case.

The Referee: That is what I tried to get you to do an hour ago.

Mr. Stevens: Yes, but I think this is doing it by requiring us to proceed out of order in the presentation of our case. A claim on file is certainly *prima facie* proof, and until it is overcome, makes it a valid claim.

The Referee: Unfortunately for you, I am the presiding man here, and until some higher authority overrules me you will have to do it the way I say you ought to do it. We will take a five-minute recess.

(Short recess.)

Q. (By Mr. Stevens): Mr. Lockwood, on direct examination I believe you testified that you had made no distribution of motor vehicle fuel which was not tax paid? A. That is right.

Q. Do you recall a conversation which you had with [25] Mr. Harold S. Williams, Chief Investigator of the State Board of Equalization for the Motor Fuel License Tax last night? A. Yes.

(Testimony of Arlie R. Lockwood.)

Q. At that time did you not admit to Mr. Williams that you made an unlawful distribution of 792 gallons of motor vehicle fuel as a result of blending 792 gallons of kerosene with a quantity of gasoline in July of 1945?

A. I did not admit that I made an unlawful distribution, no. I admitted there was approximately that many gallons of kerosene in two tanks which I termed empty due to the fact that was all we could pump out with the pumps, and I later on put gasoline on top of those tanks, or in those two tanks. There was some kerosene I couldn't get out unless I got down in the tank and pumped it out entirely dry with a suction pump.

Q. Did you not admit at that time to Mr. Williams that you sold a quantity of gasoline, including that 792 gallons of kerosene?

A. Yes. Of course, if I can explain it so that it would be clear. There were two tanks in which I had had kerosene and which I pumped the kerosene from.

Q. Mr. Lockwood, will you please answer my question yes or no and then qualify your answer?

A. Will you repeat the question please?

(Question read.) [26]

The gasoline was sold from those tanks which naturally would include that kerosene, yes.

Q. Did you admit that to Mr. Williams in your conversation with him?

A. I don't recall that I admitted it, no.

(Testimony of Arlie R. Lockwood.)

Q. Isn't it true, as a matter of fact, that you did sell gasoline which included that 792 gallons of kerosene?

A. Yes, it would be mixed in with the gasoline.

The Referee: Would that make the gasoline better or worse?

Mr. Stevens: It makes him a distributor, your Honor.

The Referee: Would that make it better or worse, Mr. Witness?

The Witness: Well,—

The Referee: Mixing gas with kerosene.

The Witness: As a matter of fact, in this particular instance there is no gasoline. It was pressure appliance fuel used for Coleman Lamps and burners and wouldn't have any effect on the gasoline.

Q. (By Mr. Stevens): But you sold the pressure appliance fuel mixed with this kerosene as motor fuel, did you not?

A. I couldn't help—

Q. Please answer the question. A. Yes.

Mr. Cobb: Counsel asks a long question and then tries to get an answer yes or no without giving the witness a [27] chance to explain. He wants to tell the facts.

The Referee: Let him tell all of the facts. I would like to hear them.

Mr. Stevens: I have no objection to the witness explaining, but I would like to have an answer. What was his last answer—yes?

(Testimony of Arlie R. Lockwood.)

(Answer read as above recorded.)

The Witness: Do you want me to explain?

The Referee: Yes.

The Witness: You see, in the storage tanks the outlet from which you pump the contents is down on the bottom on the side. In other words, it would be on the side of the tank near the bottom. Ordinarily there are several inches between the outlet and the actual bottom of the tank to allow for dirt and water and so forth to accumulate sediment. When we pump those tanks out we can only pump down to that outlet, of course, and the minute that starts sucking air it doesn't get pumped up any longer and we assume the tank is empty then.

Q. (By the Referee): Where does the outlet lead? Can you drain the tank through that outlet?

A. No.

Q. What is the good of an outlet then?

A. Well, it is to enable us to pump products in and out of the tank.

Q. Oh, the outlet is at the top? [28]

A. In other words, we disburse our products out of the pipeline connected to the bottom of the tank through a meter and pump, but when the pump will no longer pick up fluid in the tank, due to the fact it is below or at this outlet, we assume the tank is empty. In this case and in all the tanks I have they have several hundred gallons or maybe a thousand gallons in the bottom that I can't pump out

(Testimony of Arlie R. Lockwood.)

unless I go down in the tank and sop it up with a sponge.

The Referee: All right, sir.

Q. (By Mr. Stevens): Did you report and pay a motor fuel vehicle license tax to the State of California upon these 792 gallons of kerosene which was blended with the pressure appliance fuel?

A. No.

The Referee: What would the tax be on that? Let's get that as we go along so that we have some concrete idea of what the tax bill amounts to.

Mr. Stevens: I can't give you the exact figure on that because there have been some additional—

Mr. Cobb: That is covered by the special assessment which you made in the last few days of \$23.76, counsel.

Mr. Stevens: \$48.95.

Mr. Cobb: The amount of the tax is \$23.76, and 100 per cent penalty is \$23.76.

The Referee: The penalty is how much?

Mr. Cobb: 100 per cent penalty, \$23.76, and interest [29] of 1.43 of \$48.95 evidenced by assessment dated August 6th, but I think it was served here in the last few days. Is that right?

Mr. Stevens: It was served so that the 10-day period for filing a petition for redetermination elapsed on October 18, 1946.

Mr. Pines: I still don't get it straight. When was that served?

The Witness: I might answer that. I received it in the mail I think three or four days ago.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: The figures of this assessment are contained in the first photostatic copy of the determination attached to Claimant's Exhibit 1 for Identification, your Honor.

The Referee: All right, sir.

Mr. Pines: That gives the date of service, counsel.

Mr. Stevens: Only inferentially. It gives the date when the assessment becomes final, which is 10 days after the date of service. The date that it becomes final is October 18, 1946. It would probably have been received 10 days before that date.

Q. (By Mr. Stevens): Mr. Lockwood, isn't it true that during the months of January, May, June, July and September of 1945, your books and records disclose that you had sold gallons of motor vehicle fuel in the amount set forth in the second photostatic copy of the notice of determination [30] attached to Claimant's Exhibit 1 for Identification?

A. I don't know that it would, no.

Mr. Pines: Just a moment. I wish to object on the ground it calls for a conclusion of the witness. It is not binding upon the Receiver. That is not the proper way of establishing the account. It is a compound question and there is no foundation laid for it.

The Referee: And the further objection that the books themselves are the best evidence, and you have them all right here before you. The objection is sustained. This man testified heretofore before me that he did not keep his books, that he had four

(Testimony of Arlie R. Lockwood.)

or five bookkeepers over a period of a year or a year and a half. Isn't that true?

The Witness: That is correct.

The Referee: Now then I am not going to have him sit here and undertake to tell what are in his books when he didn't keep them. You have the books in your possession. There is a right way to prove these things, my friend. Get the books and prove them.

Q. (By Mr. Stevens): Mr. Lockwood, did you have a conversation in your office in April, on the 22nd of April, 1946, with Mr. Virgil M. Lyles, Supervising Auditor of the State Board of Equalization, Motor Vehicle Fuel License Tax Division, and Harold S. Williams, Chief Investigator of the State Board of Equalization, Motor Vehicle Fuel License Tax Division? [31]

A. Did I have a conversation with him?

Q. Yes.

A. I had so many conversations with him I couldn't recall any date or month or even the conversation.

Q. Do you recall a conversation with those two gentlemen in which you showed them two stacks of rations, what you called them was ration stamps, OPA ration stamps and OPA ration checks?

Mr. Cobb: To which we object on the ground it is irrelevant and immaterial. He could have shown them a bunch of Confederate money and it wouldn't have made any difference.

The Referee: I don't know.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: I would like to make a statement and offer of proof, if your Honor please.

The Referee: I will hear you.

Mr. Stevens: We will prove that Mr. Lockwood sold a great many more gallons of motor vehicle fuel than his records disclose that he purchased.

The Referee: Do you propose to show that by Mr. Lockwood?

Mr. Stevens: By his testimony, yes. I am going to try to show its relevancy. The major portion of this tax took place in 1945, prior to the end of gasoline rationing. We believe the inference is proper that if Mr. Lockwood was engaging in Black Market fuel operations there would be a [32] tendency on his part not to have his books and records disclose the sources of the gasoline which he sold. We think that if he testifies, as we will show, and we think he will testify that he did engage in those operations, that the inference, when we can find nothing else to explain any reason for the discrepancy, is a proper one.

The Referee: I will tell you right now I am not going out on a limb on inferences. You have got to prove these things to me. I am not going on inferences at all.

Mr. Stevens: In that connection, if the Court please, I would like to point out the fact that so far as the honest taxpayer is concerned his books and records are going to be complete.

The Referee: Have you shown me yet that these records are incomplete?

Mr. Stevens: No, your Honor.

(Testimony of Arlie R. Lockwood.)

The Referee: Then let's get down to that. Let's try this lawsuit like it should be. Get your books. If you have books here, produce them.

Mr. Stevens: Then may I reserve my examination?

The Referee: You have four or five auditors sitting around here, or at your call. Let's put them to work here, have them explain it and have them go over the books.

Mr. Stevens: May it be understood I reserve the right to question Mr. Lockwood further along this line?

The Referee: Certainly. [33]

Mr. Stevens: At a later date in this proceeding?

The Referee: Yes, sir. You can put him on at any time you want, but I am not going to let you prove this case backward. Start at the front end and come on down. Have you any auditors here who have gone over the books?

Mr. Stevens: Surely. I am going to put them on.

The Referee: Let's get to it right quick because I have to leave here at 4:30.

Mr. Stevens: Mr. Lockwood may step down so far as I am concerned.

The Referee: Get the best auditor you have and put him on and let him tell us what he found.

Mr. Stevens: I am going to start at the beginning and show how we got into the case.

The Referee: How who got into the case?

Mr. Stevens: How the State Board of Equalization got into the case. It is relevant, I believe.

The Referee: What has that got to do with it?

Mr. Stevens: I would like to call Mr. Williams to the stand.

The Referee: I assume they got into it because they thought there was some violation of the law; otherwise Mr. Bonelli would not send his high powered staff over here to try the case. Now here is your witness. He is under oath. What do you want to ask him? [34]

HAROLD S. WILLIAMS

recalled as a witness on behalf of the claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, did you make an investigation of the manner in which Mr. Lockwood carried on his brokerage business in motor vehicle fuel?

A. Yes. We started an investigation of Mr. Lockwood.

Q. What was the basis upon which you started your investigation?

Mr. Cobb: To which we object on the ground it calls for a conclusion of the witness.

The Referee: That is true, and hearsay—objection sustained. I will let him tell what he found but I will not let him tell what started him on the thing.

Q. (By Mr. Stevens): Mr. Williams, in the fall of 1944 did you receive a report from the Division

(Testimony of Harold S. Williams.)

of Weights and Measures of the Department of Agriculture with respect to motor vehicle fuel being sold by Mr. Lockwood? A. Yes.

Mr. Cobb: To which we object on the ground the letter would be the best evidence.

The Referee: That is true.

The Witness: I have it right here. [35]

The Referee: That would be the best evidence.

Mr. Stevens: I asked if he received a copy. I have not asked what the contents of it were.

The Witness: I did receive a copy.

Q. (By Mr. Stevens): Have you that letter in your possession? A. I have several copies.

Mr. Stevens: I would like to offer these.

Mr. Pines: May we see that before you make your offer.

Mr. Stevens: Yes (handing documents to counsel).

Mr. Pines: We object to the introduction of that evidence, your Honor. There is no connection at all between that document and this debtor.

Mr. Stevens: I would like to have it marked and then I will ask this witness some questions about it which will show its relevancy.

The Referee: Claimant's Exhibit 2 for Identification. How will you prove the authenticity of this thing? It isn't signed by anybody.

(The document was marked Claimant's Exhibit 2 for Identification.)

Mr. Stevens: This is what he said he received.

(Testimony of Harold S. Williams.)

Mr. Cobb: It does not relate to any station we had anything to do with. Even Shell's gasoline is on one of them and we haven't been able to sell any Shell gasoline. [36]

Mr. Stevens: Mr. Cobb is not testifying.

Mr. Pines: Comet Ethyl is one of the brands mentioned and the Comet was involved here. Do you remember it, your Honor?

The Referee: Yes; I had Comet Oil Company here for a few years. If you can hook it up we will hear you.

Q. (By Mr. Stevens): Upon receipt of these enclosures from the Department of Agriculture, what did you do?

A. I called the Supervising Investigator of the Department of Agriculture and discussed them with him, and he told me——

Mr. Cobb: Just a moment now. We object to any conversation with the Department of Agriculture as hearsay.

The Referee: The objection will be sustained unless Mr. Lockwood was there and heard it.

The Witness: Well, that is what started the search.

Mr. Pines: I think it is unimportant as to what started the search anyway.

Q. (By Mr. Stevens): Would you explain, for example, on the first sheet of Claimant's Exhibit 2 for Identification the meaning of the figures that are set forth?

(Testimony of Harold S. Williams.)

Mr. Cobb: We object to any contents of the document until there is a proper foundation laid showing that it has some relevancy as to this matter.

The Referee: I think you are right, sir. I will sustain the objection. [37]

Mr. Stevens: I will offer to prove by this witness that if he were allowed to answer the question he would testify that the form sent to him by the Department of Agriculture and the figures there set forth indicate that the boiling point, required boil-off of all of the gasoline taken in the sample from the debtor Lockwood's gasoline tanks would show that the boiling point was approximately 100 degrees higher than that required by the Bureau of Weights and Measures of the Department of Agriculture for the standard of gasoline.

Mr. Cobb: Just a moment, counsel. You don't mean to say that that document or this witness claims that any of those tests relate to any of Mr. Lockwood's stations?

Mr. Stevens: I certainly do.

Mr. Cobb: It shows right there where it was taken from.

The Referee: Where were those taken from?

The Witness: The samples were taken from storage tanks of service stations Mr. Lockwood purportedly delivered to.

Mr. Cobb: Well now——

The Referee: Oh, my Christian friend.

The Witness: Well, they were taken from storage tanks.

(Testimony of Harold S. Williams.)

The Referee: You say purportedly delivered to. I will hold you down to what you found on Mr. Lockwood's [38] premises. Somebody might have said that Mr. Lockwood killed someone, or that he mixed something with the gasoline to make it look like ethyl.

The Witness: Something started this investigation, Judge.

The Referee: I know, but let's find out what you found after somebody put you on the trail.

Mr. Stevens: Did I understand your Honor to deny our offer of proof?

The Referee: Yes, sir. I deny that offer of proof. I wish you would get down to something germane to this tax question.

Mr. Stevens: Have you any questions to ask?

Mr. Cobb: None.

The Referee: It is immaterial what started it, my friend. Let's find out what they found.

Mr. Stevens: All right. Because your Honor wants to hear one of my auditors testify, at this time, with your Honor's permission, I will put on an auditor, reserving the right to ask Mr. Williams further questions.

The Referee: Yes, sir. I will give you the right to put on any witness you want, providing he knows something about this tax question.

Mr. Stevens: I am calling Mr. Virgil M. [39] Lyles.

VIRGIL M. LYLES

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Will you state your name, Mr. Lyles?

A. Virgil M. Lyles, L-y-l-e-s.

Q. What is your official position, Mr. Lyles?

A. Supervising Auditor of the Board of Equalization.

Q. What are the duties required of you in your position?

A. Reviewing gasoline tax audits, assigning work, and occasionally making field audits.

Q. Did you review and audit the returns, the brokerage returns filed by Mr. Lockwood, for the period from January 1, 1945, to and including August 31, 1946?

A. I did.

Q. Did you also review the books and records of Mr. Lockwood for that period?

A. For the year 1945.

Q. For the year 1945 only?

A. That is right.

Q. Will you state what that audit revealed?

Mr. Pines: I object to that as calling for a conclusion.

The Referee: Absolutely. If he has some work sheets [40] taken from the books, I will hear it, but don't ask him for conclusions.

Mr. Stevens: All right, your Honor.

(Testimony of Virgil M. Lyles.)

Q. (By Mr. Stevens): Did you prepare work sheets in making your audit of these books and records? A. I did.

Q. Have you them with you?

A. I have them with me.

Q. Will you get them out, please?

A. Yes, sir.

Q. (By The Referee): These sheets were made by you from the books of Mr. Lockwood?

A. They were made by me or under my supervision, and reviewed by me.

Mr. Cobb: We object to any work sheets prepared by some other auditor.

The Referee: Yes, sir. We have got to have the man who made them. I want the man who made the work sheets. You cannot prove this by a supervising auditor who reviewed something that somebody sent out into the field. It may or may not be accurate.

Mr. Stevens: It is my understanding this was the auditor who made the audit. I was given to understand by Mr. Akers and Mr. Lickter is the one who made the audit.

The Witness: No. You are entirely correct in your assumption that I have made the audit as to all of these [41] sales.

The Referee: Then if this gentleman made the audit, that is keen. That is all we want.

Mr. Stevens: That is my understanding, your Honor.

(Testimony of Virgil M. Lyles.)

The Witness: There are some schedules in here which I merely checked back through the records.

The Referee: I understand Mr. Lyles audited this man's books from January 1st through December 31, 1945.

The Witness: That is right.

Q. (By Mr. Stevens): It was the result of your audit, your particular audit, that the assessment for \$27,799.22 was issued by the State Board of Equalization?

Mr. Cobb: To which we object on the ground it calls for a conclusion.

The Referee: Yes, objection sustained. Ask him what he found.

Q. (By Mr. Stevens): Will you state, Mr. Lyles, from those work sheets the facts upon which you worked and what you found with respect to the motor vehicle fuel distributions and purchases of Mr. Lockwood?

A. Well, in the month of January, 1945, we found an opening inventory of 1,467 gallons, which is the figure reported by Lockwood on his broker's report.

The Referee: 1,467 did you say?

The Witness: 1,467 gallons as his opening inventory, and we were in agreement with him on that figure. We found [42] purchases of 116,314 gallons of motor vehicle fuel, gasoline.

Mr. Pines: That is for what period?

The Witness: That is for the month of January, 1945. That is substantially the figure which Mr.

(Testimony of Virgil M. Lyles.)

Lockwood reported on his broker's report as purchases. It differs by two gallons.

Then we found sales of 122,130 gallons. That is 4,349 gallons greater than the total of the opening inventory and the purchases. That is the basis of the assessment for the month of January, 1945.

The Referee: What was the amount of that assessment in 1945? Do you have it segregated?

The Witness: We do not in our working papers have the amounts of the assessments at all. They are computed at Sacramento.

Mr. Stevens: That item will appear on the second photostat, copy of determination.

The Referee: What is the amount of it? That is all I want to know.

Mr. Stevens: There are a lot of amounts there. Take them off of the first line.

Mr. Cobb: Your Honor, I dislike to interrupt counsel, but there was a conclusion stated by the witness that there were sales of 122,130 gallons. I think he should be asked to explain how he arrived at that determination.

The Referee: You can go into that on cross-examination. [43]

Mr. Cobb: I know, but this may be quite extensive, and we might save a lot of time of the Court, counsel and everybody if we could do it at this time.

The Referee: All right, any way you gentlemen want to do it.

Mr. Cobb: Apparently the audit did not cover

(Testimony of Virgil M. Lyles.)

actual sales, but was based on certain figures from which there was an inference there were sales.

The Referee: Well, I don't know.

Q. (By Mr. Stevens): Will you proceed, Mr. Lyles, month by month to show what you found in the books and records of Mr. Lockwood with respect to his purchases and sales of motor vehicle fuel?

A. In other words, you are now asking for a summary month by month of the purchases and sales?

Q. That is correct.

Mr. Cobb: Tell us what you found and not what somebody else found. You are clear on that? You understand the question?

The Witness: Well, we have the figures for the month of January. Now, Mr. Lockwood obviously made his broker's reports on a basis of book or balancing inventories. In other words, we were not dealing with actual physical inventories. So having sales greater than the opening and purchases for the month, we have to assume that we have no inventory to carry forward at the end of the month to [44] constitute an opening inventory for February.

Mr. Pines: Do the books show the inventory at the start of the month?

The Witness: The books showed an inventory of 549 gallons at the end of January. I will have to correct that——

Mr. Pines: Pardon me a minute. I think it is quite important that we know. The witness has just

(Testimony of Virgil M. Lyles.)

stated he is disregarding the books in so far as what the opening inventory was and has assumed that he sold more, and that he didn't have any left. I think it should be clear he is either testifying to the books themselves, or just what the source of his information is, rather than draw the inference that there wasn't any inventory.

The Referee: I am not going to tax anybody on assumption, I will tell you that right now. You might as well get down to the cold, hard facts.

Q. (By Mr. Stevens): Mr. Lyles, will you state what records you used in arriving at the figures you have?

A. We used Mr. Lockwood's sales record, his sales book, in arriving at our figure of 122,130 gallons. In checking it we found an error in addition, so that the correct addition of his gasoline sales record is 119,230 gallons instead of 117,230, which showed on his progress report.

Q. That is for the month of January, 1945?

A. That is for the month of January, 1945. Now, in [45] addition to that correction of 2,000 gallons in the addition of his gasoline sales record, we found that Mr. Lockwood had a general sales record which showed his sales of commodities other than gasoline. In that general sales record for the month of January, 1945, he had one sale of gasoline for 2,900 gallons, so that we have increased his sales by 4,900 gallons for the month of January, 1945.

The Referee: Let me ask you this now:

Q. I am looking at Claimant's Exhibit 1, this

(Testimony of Virgil M. Lyles.)

photostatic copy you have, January, additional number of gallons distributed 4,349; is that the correct figure? A. That is the correct figure.

Q. On that there is a tax of \$134.47, and 100 per cent penalty, and \$11.74, I guess that is interest—yes, it is interest—a total of \$272.68 tax for the month of January, 1945.

Now the next month on this sheet is May.

A. For the month of May we have an opening inventory of 8,383 gallons. We found purchases of 157,055 gallons, which is in exact agreement with Mr. Lockwood's broker's report. Then we found sales of 236,934 gallons, which is considerably in excess of the quantity reported by Mr. Lockwood.

Q. To what extent? What is the difference?

A. Well, the difference is 95,264 gallons.

Q. More sold than his report showed that he received, is that your statement? [46]

A. More sold than his report shows that he——

Q. That he had bought?

A. Than his sales book footing showed that he sold.

Q. I see.

A. That 95,264 is an increase of sales of 96,234, an error in the footing sales book of a thousand gallons. The total on the sales book was over I stated by a thousand gallons.

Now the sales at which we arrive in our audit, when deducted from the sum of the opening inventory and the purchases, leave a figure of 7,496,

(Testimony of Virgil M. Lyles.)

which is a negative figure, that is, sales in excess of the quantity which he had on hand to sell as far as we were able to determine from the records.

Now we are again in a position where we are working with books, or balancing inventories, and the broker having sold more than he had on hand to sell, we must conclude that he had no closing inventory. That is, that is a figure which we must set up for the purpose of arriving at his total over sales.

Mr. Pines: Do his books and records show an opening inventory for the following month?

Mr. Stevens: Mr. Pines, I object to that. This is not a proper time for cross-examination.

The Referee: That is true.

Mr. Pines: I would like to have an explanation.

Mr. Stevens: I would just as soon like to have him [47] testify and let other counsel ask questions at the proper time.

The Referee: All right, go ahead.

Mr. Stevens: Would it be of any assistance to you to explain the whole system now, or would you prefer to go ahead and tell exactly what you did?

The Referee: I think you would get through a lot quicker if you explained it.

Mr. Stevens: It will be complicated.

Mr. Cobb: He is testifying contrary to the books. The books show an opening inventory and he says he must assume there wasn't one.

The Referee: Let's get along and find out the truth in the easiest and quickest way.

(Testimony of Virgil M. Lyles.)

The Witness: We have to distinguish between books and records on some of these items, and the report, the monthly report made to the State. Now the books themselves do not show a monthly inventory, but on the report submitted to the State for the month of May the closing inventory of 22,634 gallons is shown.

Mr. Pines: Do you have that on your records here?

The Witness: Here is your opening inventory and here are your sales and closing inventory. That again is obviously arrived at simply by a computation from the figures which Mr. Lockwood had used in making his report. In other words, we are dealing with computed inventories, not with actual [48] physical inventories.

Q. (By Mr. Stevens): But your figures are gross sales taken from the sales records of Mr. Lockwood?

A. If by records you include sales invoices—in other words, we found on his sales book recorded sales of 141,670 gallons and we increased that by a figure of 95,264, of which 96,264 represented sales invoices.

Q. Did you check those sales invoices against the sales records as disclosed in a sales book?

A. We did.

Q. Of Mr. Lockwood? A. Yes.

Q. And you only included such sales invoices in your audit as were not also entered in the sales book?

(Testimony of Virgil M. Lyles.)

A. That is right. He had sales invoices for the month of May, and thereafter he had sales invoices for all of the items on his sales book, and he had these additional sales tickets.

Q. (By Mr. Cobb): Were these separated, these additional sales tickets that were different from those in the books; were they separated or were they mixed up?

A. They were for the most part separated.

Q. (By Mr. Stevens): What do you mean by separated?

A. I mean that we did not find them in the same place in which we found the tickets that were entered on the books.

Q. Will you continue to explain what you found in [49] your audit?

A. Now we have the close of the month of May, at which time we show no inventory to carry forward, and Mr. Lockwood's monthly report shows 22,634 gallons.

In the month of June we find purchases totaling 122,278 gallons.

Q. (By Mr. Cobb): May I ask the witness whom he means by "we found"? Did you find it or did someone else find it? A. I found it.

Q. You said "we."

A. The sales were in the amount of 338,817 gallons as against—well, as far as the monthly report for the month of June is concerned, apparently none was filed with Sacramento, so to some extent we were on our own on these figures for the month

(Testimony of Virgil M. Lyles.)

of June. Our sales were 338,817 gallons, which was a sale in excess of purchases of 216,539 gallons.

Q. (By Mr. Stevens): By "our sales" you mean the sales which were found from the books and records of Mr. Lockwood?

A. They are the sales which are established by audit. Now for the month of July, since our sales are still in excess of purchases, we start with a beginning inventory of zero. I find purchases of 276,939 gallons, and again no report was received by our office from Mr. Lockwood for that [50] month. We find sales, or I find sales of 366,390 gallons, and we had a closing inventory taken on the 31st of July by our own investigating department which is the first physical inventory we were able to tie down. The sales and the closing inventory exceeded purchases by 138,805 gallons.

Q. (By Mr. Pines): Was that for just one month? A. That was for just one month.

Q. May we have that figure again?

A. July, the excess of sales in closing inventory over purchases was 138,805 gallons.

Q. (By Mr. Stevens): Did you state the inventory as revealed by the investigation of the State Board of Equalization, what that figure was?

A. The inventory was 49,357 gallons.

Q. (By The Referee): Let me ask you right here, how much should he pay on each gallon to the State Board of Equalization, a cent and a half, is that it?

A. He should pay three cents if he were a li-

(Testimony of Virgil M. Lyles.)

censed distributor and reporting and paying his tax on time. The State tax is three cents.

Q. Not being a broker would he have to pay any tax on any gallonage he sold as a broker, or would that be paid by the refiner?

A. If he operated within the scope of his license as a broker he would pay the tax to his vendor when he purchased the gasoline, and would make no payment directly to the State. [51]

The Referee: All right, sir. Thank you. I have paid these taxes so long, but I didn't know who got them or what they did with them when they got them. I was just curious to know.

Mr. Cobb: The manufacturer is supposed to pay the tax on all gasoline.

The Referee: Now we have gotten July. What about September?

The Witness: Well, there again we were not satisfied with the evidence of physical inventory by Mr. Lockwood at the end of August. In other words, it didn't appear that he had taken a physical inventory at the end of August. So it was necessary to combine August and September and come to a figure on gallonage unaccounted for which represented a figure for the two months as a unit rather than one month because we had a physical inventory at the beginning of August and Mr. Lockwood had taken an inventory which we were willing to accept at the end of September. So September covers a period of two months really.

In August we began with an opening inventory

(Testimony of Virgil M. Lyles.)

of 49,354 gallons, and there is a transfer in it to gasoline from pressure appliance fuel, 2,789 gallons, and purchases were 164,081, which is 1,769 gallons greater than reported by Mr. Lockwood, or rather 1,769 gallons less than reported by Mr. Lockwood. There is no means of precisely tying down the figure which he reported, because of the absence of a sales [52] record as such, or purchase records as such. His purchases are only recorded in his check record, his cash disbursement record. But the presumption is that 1,769 gallons, which after all is not particularly important, was the temperature corrections which had been allowed to Mr. Lockwood on his purchases and he took up the gross volume received rather than the scanty aggregate to 60 degrees which is the customary practice.

Q. (By The Referee): Does that gasoline expand very much while it is in the tank?

A. I don't have the coefficient of expansion with me, and of course I wouldn't remember it. It is quite a long table, but it does expand. It is sold by refineries ordinarily on a 60 degree basis so that if you buy gasoline which actually had a temperature of 80 degrees the refinery would actually charge you for perhaps a 1 per cent or more smaller volume than the actual measurement.

We have the opening inventory. We have transferred in the pressure appliance fuel which is a tax paid motor vehicle fuel. We have our purchases of 164,081 gallons. That gives a total to account for for the month of August of 216,224 gallons, and the

(Testimony of Virgil M. Lyles.)

sales were 185,221 gallons, leaving a computed closing inventory of 31,003 gallons. Mr. Lockwood had shown a closing inventory of 48,000 gallons. However, a difference in the inventory would not be material because it would merely be offset when we come to an actual [53] physical inventory at the end of the following month.

We start September with 31,003 gallons in the inventory, and purchases of 46,530 gallons, which again is 405 gallons less than reported by Mr. Lockwood, apparently on temperature corrections again. His sales were 63,084 gallons, and the closing inventory shown on Mr. Lockwood's report and accepted by us was 32,236 gallons, leaving a net oversale for two months of 17,787 gallons. That I believe is the close of our determination on the 1945 matter.

Q. (By Mr. Stevens): Did you have anything to do with making the audit on any of these other notices of determination upon which our claim is based?

A. There was an amended determination for the months of January and May, 1945. I did make the gallonage computations for that.

Q. Will you disclose what your audit revealed on that examination?

A. Well, the whole story on that was, when we made our original audit for the months of January, February, March and April, 1945, we took our sales entirely from Mr. Lockwood's sales book. We found no sales invoices in support of them. After

(Testimony of Virgil M. Lyles.)

the records were brought into Mr. Lynch's office we found then in Mr. Lynch's possession the sales tickets for those four months, and in examination and comparison of the tickets with the records it disclosed an invoice for 5,800 gallons, sales invoice in the month of January, 1945, that [54] had been entered as 5,000 gallons, and that gave rise to the 800 gallon determination for the month of January.

Q. 1945?

A. 1945. An invoice in the month of February for 1,660 gallons had not been entered on the records, and that gave rise to 1,660 gallons revision of the determination for May.

The reason it shows up in May is because in working out the comparison of purchases and sales it did not lead to an actual oversale as far as could be computed from the records until the month of May, but of course the total sales was to and including the month of May, but the increase by 1,660 gallons would show up in that month.

Q. Did you have anything to do with the determination of an additional quantity of 792 gallons for the month of July, 1945, which is set forth in a separate notice of determination?

A. I recommended that determination not alone on the showing of the records, but on Mr. Williams' report that he had been present on the day when the actual blending took place.

Q. That was the occasion of the 792 gallons?

A. That was the occasion of the 792 gallons.

Q. Of kerosene?

(Testimony of Virgil M. Lyles.)

A. And it does appear from the records as well as from Mr. Williams' report that there was a purchase of [55] pressure appliance fuel, which is a motor vehicle fuel, and on the same day when this purchase was received an inventory was taken and there was 792 gallons more on hand than had been purchased.

Q. Of kerosene?

A. Of pressure appliance fuel.

Q. (By The Referee): It was half and half by that time, wasn't it? It was what they call half and half?

A. That was the short of the record, and coupling that with Mr. Williams' report I recommended an assessment on it.

The Referee: That takes you through September.

Q. (By Mr. Stevens): That is all you can testify to as to your own audits, isn't that right?

A. That is all. I did not make the schedules in the other audit. I did not actually check them back to the records to any great extent.

Q. For these other periods?

A. I made a review in the usual way for the period through January of 1946.

Q. Did you make a demand upon Mr. Lockwood to present you with any information explaining the difference between the purchases of motor vehicle fuel as shown by his books and records, and the sales of motor vehicle fuel as shown by his books and records?

A. I did. [56]

(Testimony of Virgil M. Lyles.)

Q. For the period of your audit?

A. I did, yes.

Q. Did he furnish you with any information in this regard?

A. Mr. Lockwood furnished me with records which he said constituted all of his bookkeeping records.

Q. Did they disclose the source? Did they disclose the supplier of this gasoline to Mr. Lockwood, the supplier of an excess, or rather the difference between the total sales and the total purchases?

Mr. Pines: I object to that as being incompetent, irrelevant and immaterial as to who the supplier of the gasoline was.

The Referee: I don't see where that makes any difference. Objection sustained. We won't conduct any Black Market investigation here. We are interested only in taxes.

You are not going to finish today, and it is pretty near 4:20. When do you want to come back again?

(Discussion in re adjournment omitted. The matter was thereupon continued to the hour of 11:00 a.m., October 28, 1946.) [57]

Los Angeles, California, Monday, October 28, 1946
11 a.m.

Mr. Stevens: I would like to continue with Mr. Lyles.

The Referee: Have a seat Mr. Lyles. You are under the same oath you had the other day.

VIRGIL M. LYLES

having been previously duly sworn, resumed the stand and testified further as follows:

Q. (By The Referee): Mr. Lyles, let me ask you this so I can get it clear. These taxes which you have told us about, were they assessed against this man as a distributor of gasoline?

A. As an unlicensed distributor.

Q. What is the difference between them? Is a distributor a man who manufactures gasoline, or is he a man who buys it and resells it?

A. A distributor is one who manufactures or receives motor fuel on which there has been no prior distribution.

Q. Then a broker, as I understand it, does not have to pay that tax. That is paid by the manufacturer of the gas; is that correct?

A. That is right, the manufacturer having paid the tax to the State, passes it on to the broker.

The Referee: All right. Proceed. [58]

Direct Examination
(Resumed)

By Mr. Stevens:

Q. Mr. Lyles, I show you a paper headed State

(Testimony of Virgil M. Lyles.)

Board of Equalization, Sacramento, California, dated December 1, 1944, with the heading, "To all producers and brokers of petroleum products as defined by the Motor Vehicle Fuel License Tax Law, Subject: 1945, Licenses and Records," and ask you if you can identify that paper? A. I can.

Q. What is it?

A. It is a paper which is sent to all licensed brokers and producers of petroleum during the month of December each year advising them to renew their license prior to January 1 of the following calendar year, and containing instructions for keeping records.

Mr. Stevens: I would like to offer this into evidence, your Honor.

Mr. Pines: We object on the ground there has been no showing that that document was sent to this particular debtor.

The Referee: Objection sustained. It might have been sent to every one but him.

Q. (By Mr. Stevens): Does this paper represent the instructions, rules and regulations of the Board with respect to the keeping of books and records by brokers under the Motor Vehicle Fuel License Tax Act of the State of California? [59]

A. It summarizes them. It is supplemented by General Order No. 4, also issued by the Board.

Mr. Pines: I have no objection to it going in as instructions of the Board.

Mr. Stevens: That is all I am offering it for.

Mr. Pines: I have no objection to that.

(Testimony of Virgil M. Lyles.)

The Referee: It could not be binding on this man unless you show that he got it.

Mr. Stevens: Mr. Pines said he is willing to let it go in for that purpose.

The Referee: All right. Let's have it.

(The document was marked Claimant's Exhibit No. 1, 10/28/46.)

Q. (By Mr. Stevens): I show you another paper headed "Report of Broker for Petroleum Products," required under the Revenue and Taxation Code, Part 2, Division 2, Section 7307, and ask you if you can identify this paper?

A. I can. This is the form for the monthly report of broker which is made by all brokers of petroleum products.

Mr. Stevens: I offer this solely for the purpose of showing the typical broker's report required by the Board to be filed by brokers of petroleum products within the meaning of the Motor Vehicle Fuel License Tax Act of the State of California.

Mr. Cobb: We object on the ground that it is incompetent, irrelevant, and immaterial. It would not be binding on this [60] debtor as to tax liability, whether he made the report or did not make the report. It isn't the best evidence.

The Referee: I will let it in, Mr. Cobb, with the proviso that they introduce some evidence showing that a copy of this was mailed to this man, otherwise I will disregard it.

(Testimony of Virgil M. Lyles.)

(The document was marked Claimant's Exhibit No. 2, 10/28/46.)

The Referee: Have you any way of knowing, gentlemen, whether or not copies of these documents were sent to Mr. Lockwood?

Mr. Stevens: Only as to the general practice of the Board sending it to them.

The Referee: If you can show me he got one of them, that will be fine.

Mr. Stevens: I would like to have those now, if I may.

Mr. Cobb: What?

Mr. Stevens: The brokers reports.

The Referee: The general custom is all right, but you have to bring it to a fellow's attention.

Q. (By Mr. Stevens): Mr. Lyles, did you dictate a report of your audit findings immediately after the conclusion of your audit of the books and records of Mr. Lockwood for the calendar year 1945?

A. I did as a part of that audit as a matter of fact. [61]

Q. Is it necessary for you to refer to that report in order to refresh your recollection as to the details of that audit?

A. It would be in some cases, I believe.

Q. Will you describe the books and records produced for your inspection and audit by Mr. Lockwood, and by Mr. Lynch, the Receiver?

A. I think I had perhaps best refer to the re-

(Testimony of Virgil M. Lyles.)

port in that connection. There was a check register in which was entered the checks issued during the year against the California Bank, Bell Branch. There was a gasoline sales record written up in the regular course of operations for the months of January, February, March, April and May, 1945. There was a general sales record written up in the regular course of business, that is, a record for commodities other than gasoline, for the period from January 1, 1945, to June 30, 1945. Then there was a general sales record showing sales of all commodities, including gasoline, for a period from July 1, 1945, to December 31, 1945.

Q. Was there any additional gasoline sales record which you found in the books and records of Mr. Lockwood?

Mr. Cobb: We object to that on the ground it calls for a conclusion of the witness. He hasn't finished telling us about all of the records he found.

The Referee: Let's find out what he found. Go right ahead, Mr. Lyles, and tell us what you found, and then we [62] will ask some more questions.

The Witness: Well, there were purchase and sales invoices and miscellaneous correspondence and trucking or transportation tickets and copies of broker's reports for each month of the year with the exception of July.

Q. (By Mr. Stevens): Were there any other books and records found by you?

A. There was also a gasoline sales record writ-

(Testimony of Virgil M. Lyles.)

ten up about March of 1946 for the months of May and June, 1945.

Q. Did Mr. Lockwood have a general ledger for the calendar year 1945?

A. We were never able to find the general ledger.

Q. Did Mr. Lockwood have a purchase record?

A. He had no purchase record.

Q. Did he keep an invoice register?

A. No invoice register.

Q. Did he keep a cash receipts record?

A. The only record of cash receipts were bank deposit slips which did not show the sources of the cash.

Q. From what records did you compute the purchases of motor vehicle fuel made by Mr. Lockwood for each of the first nine months in the calendar year of 1945?

A. I computed them from purchase invoices.

Q. Did you verify these purchases?

A. They were verified by reference to Mr. Lockwood's check register and by the records of the vendors. [63]

Q. Did you examine the books and records of each vendor to see if such vendor had a record of any sales of motor vehicle fuel to Mr. Lockwood other than those evidenced by the purchase invoices delivered to you by Mr. Lockwood?

A. That was done, yes.

Q. Did you find any record of sales of motor vehicle fuel to Mr. Lockwood other than those disclosed by his purchase invoices? A. No.

(Testimony of Virgil M. Lyles.)

Q. Are the purchases found in your audit of the purchase invoices the same as the purchases reported by Mr. Lockwood in the 10 months for which reports were received by the Board in 1945?

A. They are, substantially so.

Q. And the figures which you testified to last Wednesday afternoon represented the total purchases of motor vehicle fuel for the months of January, May, June, July and September, 1945, include all of the purchases disclosed by the books and records produced by Mr. Lockwood for audit in response to your demand for any and all of his records of his purchases of such fuel?

A. They do.

Q. As I understood your testimony last Wednesday afternoon, part of the additional motor vehicle fuel which you found to have been sold by Mr. Lockwood and not reported [64] by him was disclosed by Mr. Lockwood's general sales record and by his gasoline sales record, and the balance was found in sales invoices which represented sales not entered in his general sales record or gasoline sales record, is that true?

A. That is true.

Q. Did you make any attempt to verify the sales represented by the sales invoices not entered in the general sales record or gasoline sales record?

A. I did make such an attempt.

Q. Did you make a cross-check to the records of vendees in your attempt to verify the sales made by Mr. Lockwood during the five months of January, May, June, July and September of 1945?

(Testimony of Virgil M. Lyles.)

A. I did make a cross check to the records of vendees.

Q. What was the result of that cross check?

Mr. Cobb: We object on the ground it calls for a conclusion and is not the best evidence.

The Referee: Oh, I don't know. Where did you check these records, Mr. Lyles? Were they in the possession of the vendees?

The Witness: In the possession of the vendees.

The Referee: I think I will admit it, Mr. Cobb. Objection overruled.

Mr. Stevens: Will you read the question, please?

(Pending question read.)

The Witness: About 80 per cent of the total sales [65] were found to be shown by the records of the vendees.

Q. (By Mr. Stevens): Can you reduce that to gallons, to figures in gallons?

A. Yes, I can reduce that to gallons. For the months of May, June, July, August and September the total sales shown by our audit is 1,190,446 gallons.

The Referee: Is that for five months?

The Witness: For five months.

Mr. Stevens: Or four months?

The Referee: Four or five?

The Witness: May, June, July, August, September, five months.

Mr. Pines: Would you mind repeating the figure again?

The Witness: 1,190,446.

(Testimony of Virgil M. Lyles.)

The Referee: Is that what you found he sold?

The Witness: That was the total sales. Now of that we have cross checked to the records of the vendees 816,645.

Q. (By Mr. Stevens): In other words, you found that the 816,000 gallons figure was shown by the records of the vendees to have been purchased from Mr. Lockwood? A. That is right.

Q. Did you find in existence any cases in which the records of such vendees of the gasoline sold by Mr. Lockwood did not show the purchase?

A. No, we found no such instance.

The Referee: According to my figures here, the [66] difference between 374,271 gallons is the difference between that sold and that which the vendees' records show as having been received.

Q. In other words, Mr. Lyles, he sold 1,190,446 gallons, is that correct? A. Yes.

Q. Now the vendees' records show 816,000, is that right? A. That is right.

Q. That would leave a difference of 374,201 gallons? A. That is right.

Q. Am I safe in assuming that that is unaccounted for as far as his records are concerned?

A. No, sir. That represents sales on which we did not contact the vendees for our careful check.

Q. (By Mr. Stevens): In other words, every vendee that you checked you found that his records showed the purchase represented by the purchase or sale of invoice to that vendee?

A. That is correct.

(Testimony of Virgil M. Lyles.)

Q. Calling your attention to a group of nine papers headed "Report of Broker of Petroleum Products," can you identify those papers? Perhaps I had better show them to counsel before I go further with my questioning (handing documents first to counsel and then to the witness).

A. I can identify these for what they purport to be. However, I cannot say that I have seen them before because [67] they deal with the 1946 audit.

Q. I am sorry. I was showing you the wrong group of audits.

Showing you another group of reports of broker of petroleum products, I will ask you if you can identify this group of reports (handing documents to witness)?

A. Those are reports of monthly broker reports.

Q. For what month?

A. For the months of May, August, September, October, November and December, 1945—copies which were found in Mr. Lockwood's office.

Q. Were these the copies that were used for comparison purposes in making your audit for this year?

A. With the exception of that for the month of May.

Q. Will you explain what you mean by that remark or that qualification?

A. Well, for the month of May we have here an original report signed by Mr. Lockwood, and we have a carbon copy of that original. Now there was found in his office a carbon copy of another report.

(Testimony of Virgil M. Lyles.)

Q. For what month?

A. For the month of May, 1945, and the figures shown on that carbon copy were the ones shown on the report actually filed with the Board of Equalization.

Q. Which report did you use in making your audit, your audit comparison about which you testified last Wednesday? [68]

A. We used the report filed with the Board at Sacramento and not the one shown here.

Q. Were there any other copies of broker's reports than those included in this group of which you saw in the books and records of Mr. Lockwood when you made the audit of his records?

A. There was a copy of a report for each month with the exception of the month of July, each month of the year 1945.

Q. Were reports filed with the State Board of Equalization for all of the months of the calendar year 1945?

A. We found no record of any report having been filed for the month of June or for the month of July, 1945.

Q. You did not find a copy of the report for July among the books and records of Mr. Lockwood? A. We did not.

Q. Did you find a copy of a report for the month of June, 1945, in making your examination of the books and records of Mr. Lockwood?

A. Yes.

(Testimony of Virgil M. Lyles.)

Q. Will you please testify as to what that discloses? A. Yes.

Mr. Stevens: Incidentally, I understand this is all you were able to find in response to the subpoena, Mr. Lynch?

Mr. Lynch: That is all we were able to find.

Mr. Stevens: Do you know where the other copy for [69] the month of June is?

Mr. Lockwood: I assume it was mailed in to Sacramento.

The Witness: I assume you are interested in the figures on motor vehicle fuel?

Mr. Stevens: That is right, only motor vehicle fuel.

Mr. Cobb: What month is this now?

Mr. Stevens: For the month of June, 1945.

The Witness: For the month of June, 1945, the report found in Mr. Lockwood's office showed an opening inventory of 22,634 gallons, purchases of 122,278, total to account for, 144,912 gallons; sales of 217,597 gallons, at which point the figures as to gasoline stopped, although the figures on other commodities are complete.

Q. (By Mr. Stevens): So as disclosed by the incomplete report for June, 1945, which you found among the books and records of Mr. Lockwood, there was a difference between total sales and total purchases of what amount?

A. Of about \$72,000.

Q. In other words, there was an excess of sales over reported purchases in that amount?

(Testimony of Virgil M. Lyles.)

A. Over reported purchases plus opening inventory.

Mr. Stevens: At this time I would like to offer the reports of Broker for Petroleum Products, just identified by Mr. Lyles, in evidence.

Mr. Cobb: To which we object on the ground it is [70] incompetent, irrelevant and immaterial. The only penalty put in the Act for failure to file a report is revocation of a license. It does not give them the right to assess a penalty against a broker such as forms the basis of the claim here.

The Referee: I don't know. I will overrule the objection. It will be admitted as Claimant's Exhibit No. 3.

(The documents were marked Claimant's Exhibit No. 3.)

Q. (By Mr. Stevens): I call your attention, Mr. Lyles, to the copy of a report for the month of May, 1945, which is attached to and made a part of Claimant's Exhibit 3, and particularly to the instructions on the back of that report, and I quote, "Inventories required herein must be actually gauged inventories and not book inventories," and I ask you whether you examined the books and records of Mr. Lockwood for the period from January 1, 1945, to and including December 31, 1945, disclosing that actual gauged inventories had been taken by Mr. Lockwood?

Mr. Cobb: To which we object on the ground it

(Testimony of Virgil M. Lyles.)

calls for a conclusion. How could this witness know whether he gauged it or took it out of a book?

The Referee: The document will speak for itself. It will show that, I assume.

Mr. Stevens: Your Honor, the document says on the first item "Opening Inventory," and there is nothing to indicate whether the opening inventory is a book inventory [71] or an actual gauged inventory. The books and records of this debtor disclose whether or not they were gauged inventories or book inventories.

The Referee: This document, then, does not tell us anything. How can this witness tell us?

Mr. Stevens: Because he made an examination of the books and records.

Mr. Cobb: How would he know from examining the books whether or not they went out and measured the tanks?

The Referee: Would the records disclose whether or not the man gauged it or took it from a book record?

The Witness: Well, first of all we actually in the the Board of Equalization, through its investigating department, took a physical inventory on July 31st, so at that point we have one physical inventory. The records would disclose that no official inventory had been taken prior to that point because the reports were simply balanced out month by month. The total accounted for precisely equalled the total accounted for on the report, which is a practical impossibility.

(Testimony of Virgil M. Lyles.)

Q. (By Mr. Stevens): In other words, there would be a variation of a little spillage and leakage?

A. A variation of a little spillage and leakage.

Q. That would overrun from tanks, and that sort of thing? A. That is correct. [72]

The Referee: All right, sir. Objection overruled. He has already answered the question, I take it.

Mr. Stevens: Yes, but there is one other actual inventory which was taken.

The Referee: Very well.

Q. (By Mr. Stevens): Mr. Lyles, will you tell the Court what that was?

A. Beginning with September 30th, and monthly thereafter, the condition of the report was such that we were willing to accept as a physical inventory the inventory shown thereon because they did show losses and gains and were said to be physical inventories, and we saw no reason not to accept them as such.

The Referee: Didn't they have loss by evaporation?

A. Ordinarily, yes, sir.

Q. If a man gets 10,000 gallons of gas in his tank, wouldn't he lose some of it by evaporation?

A. That is correct, possibly as much as 1 per cent through the summer months.

Q. (By Mr. Stephens): As a matter of fact, the Board allows a certain tolerance for such evaporation, doesn't it?

(Testimony of Virgil M. Lyles.)

A. That is a statement which is very often misunderstood when it is made. It simply comes to this, that if the loss that is shown by a report is in an amount which could reasonably be due to evaporation, we do not question it, but we do not put it in a certain figure there as 1 per cent as [73] loss and adjust some of your other figures to take it up.

Mr. Stevens: That is all I wish to ask this witness at this time, your Honor.

The Referee: All right, sir. Any questions?

Cross-Examination

By Mr. Cobb:

Q. Mr. Lyles, you went out to these different parties where Mr. Lockwood's records indicated he had sold gasoline and you verified the fact that he sold a certain amount of gasoline, is that right?

A. That is right.

Q. The amounts that you were able to verify the sales of were approximately what Mr. Lockwood had reported in his report that he had sold, wasn't it?

A. I don't think, without an examination of my records at least, that that is the case. I think it was more than actually he recorded as sold.

Q. Would you say it exceeded the amount that he reported he sold?

A. That is my recollection.

Q. What did you say the total reported sales of gasoline for the five months were?

(Testimony of Virgil M. Lyles.)

A. The total reported sales of gasoline for the month of May was 136,343 gallons.

Q. Do you have the grand total for the five months? A. No, I don't. [74]

The Referee: I thought you gave it to me as 1,190,446?

The Witness: That was an audited figure and not the recorded figure.

The Referee: All right, sir.

Q. (By Mr. Cobb): In order to save time would you be willing to total those, and after lunch give us the total of the five months' sales?

A. I can give you the figures after lunch.

Q. The total figure? A. Yes.

Mr. Stevens: You understand there were no reports filed with the Board for June and July?

Mr. Cobb: He told us here he found sales totaling one million—taxing, 1,190,466 gallons. He says Mr. Lockwood made reports for sales that were much less than that. I am trying to find out what his total reports were. In the month of May he used a figure—whether Mr. Lockwood reported it or not.

The Witness: I can give you month by month comparison records.

Q. (By Mr. Cobb): All right, Mr. Lyles, we will do it that way.

A. For the month of May, recorded sales 136,343 gallons, cross checked to vendees, 165,502 gallons.

Now of course in the month of June the only

(Testimony of Virgil M. Lyles.)

figure we [75] can give you is the figure from the incomplete report found in Mr. Lockwood's office which was not filed with the Board. That showed 217,597 gallons. We cross checked 260,505 gallons.

For the month of July no report was made by the broker.

Q. How much do you find was sold to vendees in July?

A. We found 274,951. August, reported sales were 170,155 gallons. We checked through the vendees and got 108,622.

For the month of September we were only attempting to cross check certain unrecorded sales so that we only checked 7,065 gallons for the month of September.

Q. In August you found the vendees' sales were approximately 65,000 gallons under the reported sales, while in July you found an overage there of approximately the same figure, is that right?

A. In the month of July the broker did not report.

Q. These sales would vary in accordance with the time that they were entered upon the records during the first day of the month and the last day of the month, would they not?

A. I don't know that I follow your question there exactly.

Q. What date did you consider was the closing day of the month, and when was the sale consummated for the [76] purpose of your investigation?

A. The sale was consummated at any time dur-

(Testimony of Virgil M. Lyles.)

ing the calendar month, including both the first and the last days—I considered it as a sale of that month.

Q. How do you define sale or consummation of a sale?

A. Actual delivery in so far as we have any record of it. If we do not have records of actual deliveries then it has to be an invoice date.

Q. The invoice date might be several days from the delivery date, wouldn't it?

A. That is a possibility. It might affect one month to an appreciable extent, but over a long period of time, however, it would be of no important effect.

Q. Under your assessment you jumped around from month to month, isn't that a fact? In other words, you start the first month in January and then jump to May.

A. That is true, and the effect would have been the same had we carried the entire assessment down to September 30th and made it all as a September assessment.

Q. Then you jump from July to September and exclude August, is that right?

A. No. We take August and September as a unit but——

Q. You found in August that there was 1,769 gallons, or in September that there were less sales than purchases, didn't you?

A. That is an excess of sales over purchases. [77]

Q. Didn't you state the other day that this 1,769

(Testimony of Virgil M. Lyles.)

gallons, which you figured was a small figure, you would just ignore that or something to that effect?

A. Are you speaking of the 17,787 gallons which appears on our tax determination—17,787?

Q. Maybe it is. My notes aren't complete.

A. For the month of September, 1945?

Q. Yes.

A. A physical inventory of the stocks on hand at July 31st had been taken.

Q. Yes.

A. No, August 1st we start with that physical inventory, we add the purchases, and I may say that what we have accomplished in the final analysis is to add purchases for both August and September and deduct—or rather we added that to the opening inventory.

Q. Let's stick to August. You haven't seen fit to average out some other things here.

A. All right.

Q. At the end of the month of August—you had started the month with a physical inventory.

A. That is right.

Q. At the end of the month of August what did you find the situation to be as to sales and as to inventory?

A. We found the sales to be 185,229 gallons, but we were unable to say whether there had been any oversale in [78] August because we did not have a physical inventory at the end of August.

Q. You found sales, though, for 185,000, is that right?

A. That is right.

(Testimony of Virgil M. Lyles.)

Q. You had an inventory of how much to start with?

A. We had an inventory of 49,354 gallons.

Q. You found purchases of how much?

A. Of 164,081 gallons. Before we had that we also found a transfer to gasoline from pressure appliance fuel, 2,789 gallons.

Q. Would that go on or off?

A. That goes on. That is an increase in gasoline stocks.

Q. Then you found an overage in favor of Mr. Lockwood starting September 1st under those figures, didn't you?

A. We found, deducting the sales from those total receipts and opening inventory, that he had a book inventory of 31,003 gallons on hand.

Q. As of what date?

A. As of August 31, 1945. What his actual inventory is we had no means of knowing, or what it was as of that date.

Q. Now, as of September 30th, if gasoline had been sent out, but had not been invoiced, you would have a smaller inventory, and if the sale was not on the records, why, you [79] would have a shortage in sales, wouldn't you?

A. If gasoline had been sent out and we had no record of the sale?

Q. In other words, you did not bill until the next day for gasoline, or for the next week, it wouldn't appear then on the records; you would then charge

(Testimony of Virgil M. Lyles.)

him and tax him for a deficiency there for the month of September, wouldn't you?

A. I think we are going backward on this. If his sales had been understated it would decrease the oversale.

Q. What if gasoline had been invoiced and had not been delivered, how would you treat it that way?

A. Of course, since we had no record of sales other than those invoices, and since the stock would still be on hand in his closing inventory, if it had not been delivered that situation would increase the oversale.

Q. And you would tax it accordingly?

A. That is right.

Q. When you referred to sales all you knew as to whether or not there was a sale is what you found out from the records?

A. What we found from Mr. Lockwood's records and the records of such vendees as we contacted.

Q. The records of the vendees that you contacted did not amount to anywhere near the amount that you taxed him on, though, did it? [80]

A. No, it did not amount to the full amount of our tax determination.

Q. Now, then, assume that one of these delivery slips that you have testified were off in a separate group, was not posted in the ledger, had been written in error, and for that reason it would not be entered in the ledger, would it?

(Testimony of Virgil M. Lyles.)

A. It shouldn't have been entered in the ledger if it had been written in error.

Q. You took all of these delivery slips that you found in a separate group out there and assumed that those were bona fide sales, didn't you?

A. That is right.

Q. Then assume that Mr. Lockwood's truck driver brought in a delivery slip from John Jones, and then the next day Mr. Lockwood went out to collect for that, and assume that he had to give the owner of the service station another sales slip and received the money, and then he brought it in to the bookkeeper, this sales slip that he collected for, and told him to disregard the one that the truck driver took, then you would be taxing him twice for that one delivery of gasoline, wouldn't you?

A. If all of those things happened we would be taxing him twice.

Q. Then if Mr. Lockwood instructed the bookkeeper just to keep these truck drivers' delivery slips where they [81] weren't paid and weren't posted in the book, in a desk drawer, and you came along and figured them all up, why, you would have an overage of the total amount of this unused group of delivery slips, would you?

A. I see no reason to dispute that statement.

Q. Now with respect to the purchase of gasoline, if Mr. Lockwood's records reported from whom he purchased it and you——

Mr. Stevens: I am going to object to any further

(Testimony of Virgil M. Lyles.)

questioning along this line on the ground it is speculative. If Mr. Cobb wants to lay a foundation for asking these questions by an offer of proof, if it relates to alleged facts around which he is posing these hypothetical questions, then I think he should do it that way.

The Referee: I am inclined to agree with you. It is 12 o'clock, gentlemen. I will hear you again at 2.

(Discussion in re adjournment omitted.) [82]

Los Angeles, California

Monday, October 28, 1946—2 P.M.

The Referee: Now we have this Lockwood matter.

Mr. Cobb: Ready.

VIRGIL M. LYLES

having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Resumed)

By Mr. Cobb:

Q. Mr. Lyles, when you made a check of the vendees of Mr. Lockwood, did you go to all of the different stations which you understood he had sold gasoline to?

A. We did not contact all of them because we knew that quite a few of them have changed hands or are out of business.

(Testimony of Virgil M. Lyles.)

A. No, because the brokers' report does not show the detail of the purchases and sales, only the total figure. What I saw was the regular audit that our audit staff makes.

Q. In other words, you got an audit of all of the brokers Mr. Lockwood sold to similar to the one you made of his business? A. That is right.

Q. Except you didn't do it personally; someone else [85] did?

A. I didn't do it personally. It was done by auditors assigned by me and the audits were reviewed by me.

Q. And if there was an overage or a shortage in inventory, or something was wrong in their records, that would naturally reflect——

Mr. Stevens: We will object to that as assuming facts not in evidence.

The Referee: Well, that would naturally follow. I don't see any other answer that this man could make. If there was an order this man would reflect it. The objection is sustained.

Q. (By Mr. Cobb): Do you have any report of what amount you charged to brokers?

A. Yes, sir.

Q. How many gallons?

The Referee: Are the sales to brokers included in your figures which go to make up this eight hundred some odd thousand gallons?

A. No; a very small part are; to the extent of some 40,000 gallons, perhaps.

(Testimony of Virgil M. Lyles.)

The Referee: All right.

Q. (By Mr. Cobb): But you, for the purpose of establishing the tax, have not taken this 800,000 gallon figure; you have taken 1,190,000, have you not?

A. Well, the 1,190,000 is the total audit sales for [86] the five months beginning with May, 1945, and ending with September, 1945.

Q. You established the tax on that figure, less purchases that you found Mr. Lockwood had made that you were willing to accept, less the inventory on hand on May 1st, is that right?

A. Less the purchases made during the five months and the inventory on hand on May 1st, and some 2,700 gallons that was transferred to motor vehicle fuel or to gasoline from pressure appliance fuel.

Q. So you don't know in this 1,190,000 gallons how much was sold to brokers in connection with that figure?

A. Yes, I could give you that figure.

Q. Will you give it to me, please?

A. It will require a little computation.

The Referee: Do you need a pencil and paper?

The Witness: I think I have some paper here; 645,723 gallons sold to brokers.

The Referee: Sold to brokers?

A. Yes, sir.

Q. (By Mr. Cobb): Now did you check any of these sales slips that you found in a separate drawer

(Testimony of Virgil M. Lyles.)

of the desk, I believe you described it, with the delivery records of the particular station or broker to determine whether or not the gasoline represented by that sales slip was delivered to the station and paid for by the station? [87]

A. The total sales to each of these brokers as shown by the audit of that broker—in other words, as shown in his audit purchases, are in agreement with the figure shown in the audit of sales.

Q. Would you read the question again, please?

(Question read.)

Mr. Cobb: Am I confusing you?

Q. As I understand it, you went down to Mr. Lockwood's and you found there were certain sales slips in the drawer of his desk that were not found in his ledger, is that right?

A. I don't believe I have previously said so, but that is right.

Q. And you took those slips and computed the number of gallons of gasoline represented by the sales slips and used that as one of the bases for establishing the tax here?

A. That is right.

Q. Now those sales slips that you found in the drawer of the desk showed deliveries to certain vendees, did they not?

A. Yes, sir.

Q. Now, did you check the deliveries as shown by those sales slips with the vendees' records to see whether or not the gasoline was delivered and paid for by the vendees?

(Testimony of Virgil M. Lyles.)

A. I checked them in part; I did not check all of them.

Q. Can you tell me one that you found in the drawer [88] that was delivered to a station and paid for by the station and showed on the vendee's records?

A. Well, the sales to Rubin's Service.

Q. All right. What is that address?

A. That is on Beverly Boulevard; I don't know that I have a list of those addresses with me. It is near Vermont on Beverly.

Q. Does he have more than one station?

A. Not to my knowledge. No, I don't have the addresses.

Q. Well, can you tell me of a delivery slip that you found in the desk drawer, give me the number of it and the amount of gallons it represents, and then tell us what you found at the Rubin's Service Station?

A. Under date of May 2nd, Sales Ticket No. 4043 for 2,094 gallons, that was a sales ticket found in the desk, to which you refer. I have here Check No. 1816 of Rubin's Service for \$303.63, and the notation which was on the margin of that check is "2,094 gallons," and the date of the check is May 7, 1945.

Q. May 7th? A. Yes, sir.

Q. And the delivery slip was dated May 2nd?

A. That is right.

Mr. Cobb: All right.

Q. Now did you find another one? [89]

(Testimony of Virgil M. Lyles.)

A. Well, we might as well stay with the same customer. On May 11th we have a sales ticket, Ticket No. 2900 for 1,200 gallons, and on May 14th, Check No. 1821, with the notation "1,200" on the margin.

Q. May 14th, the check was for how much?

A. \$174.

Q. Now on that did you find that these two checks were posted on the ledger of Mr. Lockwood's books?

A. Mr. Lockwood had no cash receipt record through which we could trace his receipts.

Q. I thought you stated this morning he had deposit slips?

A. He had deposit slips, but they showed no source as to the total of the checks.

Q. Did these deposit slips show this amount going into his bank account about that time?

A. I could not say at the present time whether they did or not. I got these checks long after we completed the work at Mr. Lockwood's office.

Q. Did you check his general ledger to see if he had invoiced these particular parties of this amount of gasoline?

A. We were never able to find that he had a general ledger during 1945.

Mr. Cobb: Will you please read the question?

(Question read.) [90]

Mr. Cobb: Strike out "general ledger."

(Testimony of Virgil M. Lyles.)

Q. You found invoices out there in his records, didn't you? A. Yes, sir.

Q. Did you check to see if this Rubin's Station was invoiced for this amount of gasoline represented by these checks?

A. That was the occasion for being at Rubin's Station in the first instance. We had found sales tickets in Lockwood's office made out to Rubin's Station, and we had not found them under his sales book.

Q. Well, you know what an invoice is, don't you? A. Yes, sir.

Q. Did Mr. Lockwood send out invoices where gasoline was not paid for cash on delivery?

A. I presume that was his practice, I don't know whether it was or not.

Q. You found invoices there in his place of business, did you? A. Yes, sir.

Q. Did you check the invoices to see whether or not invoices were sent on these two particular shipments of gasoline?

A. There was no record which would have shown us the information.

Q. You didn't look for an invoice to the [91] Rubin's Service Station on or about that day?

A. We found an invoice to the Rubin's Service Station. That was exactly why we were checking.

Q. You found not only a delivery slip but you found an invoice in Mr. Lockwood's office covering these two shipments of gasoline to Rubin's Service Station?

(Testimony of Virgil M. Lyles.)

A. There is no distinction as far as I can see between Mr. Lockwood's invoices and his delivery tickets. I don't believe he even uses a delivery ticket.

Q. Do you have copies of any of those invoices or delivery tickets in court?

A. No. They are not under subpoena.

Q. When the gasoline is delivered by a driver to Rubin's Service Station, what type of document was given the operator of that station?

A. If anything was given to him at that time, I presume it was an invoice.

Q. If he paid cash for it did you find that a copy of the invoice or delivery slip was given to the operator of the station and the original, receipted for by him, was returned to Mr. Lockwood's plant? I don't want to confuse you. Will you just tell us how they handled that and what documents they used? I am not trying to catch you on a trick question.

A. I understand that. The practice appears to have been to leave a copy of the invoice with the vendee at the [92] time of delivery and to return a copy to the Lockwood files.

Q. And if the operator at the station paid cash to the driver, how was it handled in Mr. Lockwood's place of business when it was returned?

A. That is a matter that is open to some question because in my belief a great many of the invoices were simply stuck in the desk and not entered in any records whatever.

(Testimony of Virgil M. Lyles.)

Q. Well, those that were entered, tell us the course they took, if you can?

A. Those that were entered were entered on a sales record and we were not able to tie them in with any cash receipt record; there being no cash receipts record.

Q. Then if the truck driver brought in the invoice or delivery slip with the cash, that would apparently go to the bookkeeping department and be entered? A. That is right.

Q. If he didn't pay cash and brought back a delivery slip, how did they handle that situation?

A. That, I think, in view of the condition of their records, was handled by simply holding the invoice until they collected the cash.

Q. Did they carry an accounts receivable account during that interval that they held the delivery slip?

A. There were some accounts receivable carried, but the record was incomplete and the postings as to credit for [93] cash receipts was simply direct entries in the account, not posted from any book of original entry.

Q. Did you find in the sales record whether or not these accounts receivable were posted, or were the sales contracts only the cash sales?

A. The sales records to the extent that sales were recorded appeared to represent both cash and credit sales.

Q. Then what were you able to find in regard to the transactions you say they just held delivery

(Testimony of Virgil M. Lyles.)

slips until they got the cash; where were they posted?

A. If they were entered at all they were entered in the sales books.

Q. Did you find quite a few cases where they didn't enter them in a sales record until they collected them?

A. It is of course very difficult to say when a particular item was entered in the sales record; and I say that apparently they held a number of these tickets for a few days until they collected the cash before they entered them, simply because it seems to me with the sketchy accounts receivable records they had they could not have kept track of the records in any other way.

Q. You used all of the sales you could find represented by the delivery slips and all sales you could find represented on the cash register to compute what you claim was the total gallonage sold by Mr. Lockwood?

A. In the final analysis we used the sales [94] slips because we have found all of the sales on the sales record to be represented by sales slips.

Q. Well, did you make any charges for sales to the accounts that were not represented by sales slips?

A. Yes, sir.

Q. And where did you get the figures for that charge?

A. Well, I can best find those, I think, by referring to some of the memoranda that I have here.

(Testimony of Virgil M. Lyles.)

In the case of George M. Cowey, doing business as Scotty's Service Station, among the records of Mr. Lockwood's, in his office, we found transportation receipts covering six loads of gasoline which had been held by the Thompson Tank Line, a receipt showing receipt from Dependable Oil Company and delivered to Scotty's Service Station. I went to Scotty's Service Station to see what those represented. I found that Scotty had copies of those transportation receipts that he had issued checks to Dependable Oil Company in payment of the gallonage shown on them and it referred to the transportation receipt number on the margin of his check, and he said he did not have the invoices but he had purchased that gasoline. Subsequently when we found the invoices in Mr. Lockwood's desk, we did find three invoices for the same gallonage and the same date as three of those transportation receipts, for I assumed they covered the same sales.

Q. Do you have the check of Scotty's Service Station covering that transaction? [95]

A. I have.

Q. May I see it?

A. They are all in that group; five of them.

Q. Now this check of June 8, 1945, shows Invoice No. 1023 and 1024 and 1025?

A. Yes, sir, which happens to be the same numbers as these transportation receipts.

Q. And that is Mr. Lockwood's invoice number?

A. It is not his invoice number; that is the Thompson Tank Line transportation receipt, they

(Testimony of Virgil M. Lyles.)

being the ones who picked it up at the Dependable Oil Company and hauled it to Scotty's Service Station.

Q. Now this check for \$1,147.50, June 12th, that does not contain any reference to any invoice number, does it? A. No, it does not.

Q. Did you determine where this gasoline came from that is represented by these delivery slips?

A. I can only take those at face value; they say it was received at the Dependable Oil Company by the Thompson Tank Line.

Q. Did you try to ascertain where the gasoline was refined?

A. Not as to that particular gasoline as a separate item. It came out of Mr. Lockwood's storage tanks, as the transportation receipts say, then it would merely become a part of the general question; where the amount of oversold [96] gasoline came from.

Q. Now this Reliable Oil Company, referring to 147, did you determine where that gasoline came from?

A. That, according to Scotty or Mr. Cowey, all six of those loads came from the Dependable Oil Company.

Q. You notice the Thompson Tank Line shows it came from Reliable Oil Company?

A. That is true as to that ticket.

Q. That one ticket represents 4,500 gallons, does it not? A. It does.

(Testimony of Virgil M. Lyles.)

Q. So all you are going on is the word of Mr. Cowey or someone that that gasoline came from Mr. Lockwood's tanks?

A. Plus the fact that these others show Dependable Oil Company and Reliable in the one case is not too much of a——

Q. Well, you notice the other one was delivered on the 9th, and this one we call your attention to was delivered on the 18th; that is nine days difference in time, isn't it?

A. That is right. If that is the 18th and not the 8th.

Q. Then the fact that Mr. Cowey told you the one was received from the Reliable Oil Company, and it came from the Dependable Oil Company, you took that as evidence of 4,500 gallons sales, did [97] you?

A. This check refers specifically to that transportation receipt number and this is a check to Dependable Oil Company.

Q. But all that you have are these documents here and what Mr. Cowey told you, is that right?

A. That is right.

Q. Now then, the last check refers to Invoice 1861 and 1862; Mr. Cowey payable to Dependable Oil Company; now that is represented by two invoices from Dependable Oil Company to Scotty's Service Station?

A. That is right. And those are for 2,900 gallons each, and 2,900 gallons is the capacity of Mr. Lockwood's tank.

(Testimony of Virgil M. Lyles.)

Q. And on that delivery you don't have any sales delivery slips; you have an invoice, isn't that right?

A. That is the invoice form; it is the only form we have set up in our sales; we have set up nothing which could be called simply a delivery receipt.

Q. Did I understand you to testify a few moments ago that you didn't find any invoice given or sent by Mr. Lockwood to vendees; that they always used delivery slips; is that what you meant to say?

A. What I meant to say was that he has no delivery ticket as such; he has only an invoice form.

Q. Now let's get this straight: This document here is not a delivery sales slip, that is given by the driver to [98] the vendee, is it?

A. Well, then, we have no delivery slips included in our audit. This is what we have.

Q. Well, whether it is in your audit or not, if you will try to help me get this point clear: When the driver delivered to the vendee gasoline, I understood you to say he delivered to the vendee a copy of the delivery slip and that he brought another copy back to Mr. Lockwood, is that right?

A. You are carrying me beyond the scope of my personal knowledge.

Q. That is the whole thing and what I want to bring out. You are not in a position to testify definitely how this was handled, are you?

A. I am not in a position to testify whether the driver at the delivery of gasoline left this invoice

(Testimony of Virgil M. Lyles.)

or whether Mr. Lockwood or someone else delivered it or mailed it later.

The Referee: 1,200 gallons at \$174, at 14½ cents a gallon; is that the regular price of gasoline at this time?

A. The price ranged from 12 cents to 15 cents.

Q. It did?

A. Yes, sir. This was a wholesaler.

Q. The customer would pay 4½ cents tax, wouldn't he? If I drive in and try to buy some of this gas I would have to pay 4½ cents tax, that would make 19 cents? [99]

A. Well, the tax is presumed to be included in this price.

Q. (By Mr. Cobb): The service station operator usually has a commission of 3½ to 4 cents, doesn't he? A. That is right.

The Referee: They always make me pay the 4½ cent tax. Am I to understand that the refiner pays the 4½ cents and then I come in and pay another?

Mr. Cobb: You reimburse the gasoline station who in turn paid it to the refiner.

Q. (By Mr. Cobb): Now, the State Board of Equalization has quite an organization that checks the refiners of crude oil to determine how much they refine each month?

A. They have, they have such an organization.

Q. And for all gasoline refined you insist that the refiner pay the State 3 cents a gallon?

A. That is not quite an accurate statement. As to oil that is refined and sold or used.

(Testimony of Virgil M. Lyles.)

Q. For consumption in California?

A. Yes, sir.

Q. Now when you started to investigate Mr. Lockwood did the thought occur to you how he could acquire gasoline from any refinery without paying a tax for it?

A. I am tempted to give an indirect answer to that by saying I would not have been working on the case for months and months if I had not been concerned with where he [100] got it.

Q. Well, if he got it from a refinery, wouldn't it be assumed that the refinery paid the tax to the State?

A. If he got it from a refinery and that refinery had not paid the tax to the State, I think I can say the State Board of Equalization would see that he did.

Q. And the refineries are required to have up a large bond, and they have to pay the tax every week?

A. Those who report and pay tax on a regular basis have a bond of approximately twice the amount of their distribution.

Q. And if you found the refinery had sold the gasoline to Lockwood that Lockwood sold to Rubin's Station, that refinery would be liable for the tax, wouldn't it?

A. Let me say that the refinery who sold the particular gasoline, assuming a refinery sold it, represented by Mr. Rubin's purchases, may very well

(Testimony of Virgil M. Lyles.)

have reported and paid the tax on that particular gasoline. It is the oversales we are concerned with, and it is practically impossible to say where those oversales went to. Sales representing the overage.

Q. So it is not any particular sales that you charge Mr. Lockwood with having made, a certain tank load of gasoline and not having paid the tax or bought it from someone who paid the tax?

A. It is not a particular load; it is the [101] excess of sales over purchases and opening inventory.

Q. And did you rely on his records or lack of records to arrive at the figure, is that it?

A. I rely on such records as we found.

Q. Which you summarized by saying they are quite incomplete and not well kept records, is that it?

A. That would be an accurate statement, whether I made it or not.

Q. Now you have been unable to find where any of this gasoline, six million gallons of gasoline he handled, was acquired by him without having paid the tax on it or bought it from someone who did pay the tax on it?

A. We have been unable to find any specific instance in which he received gasoline without paying the tax on it.

Q. And has considerable effort been made to determine whether there was any such gasoline available in Southern California that anyone could buy without paying the tax on it?

(Testimony of Virgil M. Lyles.)

A. During the year 1945 I believe that particular work took a large part of our investigating department.

Q. How many men are in your investigating department?

A. About a half a dozen, roughly. I would have to refer to Mr. Harold Williams for that.

Q. And they were unable to find one load of gasoline that went to Mr. Lockwood's plant that didn't come from a refinery who was paying the tax to California? [102]

A. That is true, I think. I know of no instance in which they found a load on which the tax had not been paid.

Mr. Cobb: That is all.

The Referee: Do you have any more witnesses?

Mr. Stevens: I have another auditor.

The Referee: This man is a very capable man.

Mr. Cobb: I agree with you on that.

(Recess.)

Mr. Pines: I would like to ask a question or two.

The Referee: All right.

Cross-Examination

By Mr. Pines:

Q. Mr. Lyles, in making your audit, did you have some discussion with Mr. Lockwood in respect to his books and records? A. Yes, sir.

Q. Did you find he had any knowledge of the books himself?

(Testimony of Virgil M. Lyles.)

A. I was not able to find he had very much knowledge of bookkeeping himself.

Q. Did he make the statement to you that he left those things up to the employees, or hired help?

The Referee: That would not relieve him, Mr. Pines.

Mr. Pines: It might with respect to the penalty, your Honor.

The Referee: I have three girls out here and I am responsible for whatever they do. I don't see how that would [103] relieve Mr. Lockwood.

Mr. Stevens: I object to the question on the ground it is immaterial.

The Referee: I was rather of that opinion. However, I will hear it. A fellow comes in here and pays \$40 and my girls give him a receipt for it, and I am responsible.

Q. (By Mr. Pines): Well, is it a fact that during this audit you directed Mr. Lockwood's attention to the fact that his bookkeeper for a portion of the time had actually been drawing money out of the business that was unauthorized, and had been raising the checks?

A. That is not an accurate statement. I asked his office man or clerk if he could give an explanation of why certain checks were entered as of a different amount from what the check was actually made out for and paid, and the clerk brought that question to Mr. Lockwood's attention, as a result of which Mr. Lockwood found certain speculations, I believe.

(Testimony of Virgil M. Lyles.)

Mr. Stevens: I move to strike that last as hearsay.

The Referee: No, I am going to let that in. I find that the more you let a man talk the more you learn. The objection is overruled.

Q. (By Mr. Pines): What was the nature of the activities of this bookkeeper that Mr. Lockwood was surprised to find when you directed his attention to those figures?

Mr. Stevens: May it be understood that I am objecting [104] to all of these questions.

The Referee: Yes, the same ruling. What was the question?

Q. (By Mr. Pines): What was is that Mr. Lockwood's attention was directed to as a result of your findings on the drawings of this bookkeeper?

A. I don't know that I exactly follow that question. I asked him why certain checks had been made out and paid by the bank for amounts which differed from the amounts entered on the check register, and beyond that point I think it was more or less in Mr. Lockwood's hands. It developed that a man was merely an employee and the differences had nothing to do with my audit, so I dropped it.

Q. Did you direct Mr. Lockwood's attention, or cause to be directed Mr. Lockwood's attention to the fact that this bookkeeper had been entering his compensation at one sum and making out checks for another sum?

A. I directed his attention to the fact that those

(Testimony of Virgil M. Lyles.)

differences between the checks and the book entries existed.

Mr. Pines: I think that is all.

The Referee: Would the checks be in larger sums than the book entries?

A. They were, yes, sir.

The Referee: Any other questions? Thank you, and you may stand aside.

Mr. Stevens: I have some [105] cross-examination.

The Referee: Oh, my goodness.

Mr. Stevens: Or redirect, I mean.

The Referee: All right.

Redirect Examination

By Mr. Stevens:

Q. You testified on cross-examination to the figures reported as sales by Mr. Lockwood for the months of May, June, August and September, and I will correct that; for the months of May, August and September, and the amounts are shown on the uncompleted broker's reports to Lockwood, which was not filed with the Board, and you also testified as to the number of sales which you cross-checked to vendees' records for the months of May, June, July, August and September, 1945; now, I am going to ask you how many gallons cross-checked by you for the month of May, 1945, were sales shown by the sales invoices contained in the separate drawer to which Mr. Cobb has referred?

(Testimony of Virgil M. Lyles.)

A. The answer is 30,028 gallons.

Q. Out of a total of how many gallons for that month, as shown by the sales invoices in that drawer?

A. 96,264 gallons.

Q. Now for the month of June?

A. For the month of June?

Q. You testified you cross-checked 260,505 gallons of gasoline to vendees' records; of that amount how many gallons represented sales as shown by sales invoices in this [106] separate drawer?

A. That would be 70,925 gallons on invoices not entered on his books or cross-checked.

Q. Now, will you explain how many of the unrecorded sales as shown by these sales invoices were verified by a cross-check to vendees' records for the month of July, 1945?

A. For the month of July of the 51,450 gallons additional sales tickets found—wait a minute—of the 60,020 gallons of sales tickets found, I cross-checked 19,050; that is not the entire figure cross-checked, but it is the quantity of those tickets found in the drawer that were cross-checked.

Q. And for the month of August what was that figure?

A. 6,600 gallons in tickets were found; 2,900 cross-checked.

Q. That is tickets that were in this separate drawer?

A. That is right.

Q. And the reason you were unable to check on the balance of the gallonage was because you were unable to find the vendees?

(Testimony of Virgil M. Lyles.)

A. In a great many instances there was a station that had changed hands, and if you go out to one of them you find a new operator, and there is some question in my mind as to whether or not the State is justified in spending an unlimited amount of time in rectifying the broker's own mistake.

Q. Also you were asked on cross-examination whether [107] or not you did not jump from January to May and from July to September in making your audit. Isn't it a fact that you made a continuous month by month audit for the entire period?

A. The computation of the oversales as shown in this audit is a continuous computation and we might have shown the entire amount of the oversales in the month of September and the results would have been no different except as to the amount of entries.

Q. But you did not arbitrarily jump from the month of January looking to the month of May, and from looking at the month of July to the middle of September? A. No.

Q. Upon my direct examination this morning you testified that there were two gasoline sales records for the month of May, 1945, one of which was prepared in March, 1946, and the other which apparently was prepared in the ordinary course of business? A. That is right.

Q. Will you explain or will you state where you found these—where you found this gasoline sales record for the month of May, 1945, which was not the same—entries of which were not the same hand-

(Testimony of Virgil M. Lyles.)

writing as those for the months of January, February, March and April of 1945?

A. That was found in Mr. Lockwood's desk.

Q. In the same place where you found these other sales invoices [108]

A. That is right. It was just in the form of three looseleaf sheets which were of the same type as had been used in the regular sales record, but they had been removed apparently from the binder and put in the desk.

Q. In the testimony which you gave on cross-examination you used the terms "sales invoice and delivery ticket" interchangeably, did you not?

A. Yes, sir.

Q. And Mr. Cobb questioned you on the taxability of sales by a refinery of gasoline on his cross-examination; would you state what records were required to be turned in to the State Board of Equalization by a refinery who also engaged in the sales of motor vehicle fuel to the State Board of Equalization during the period of gasoline rationing?

A. The records require it to be turned in to the Board would be a periodical report, which might be either weekly, or monthly, but ordinarily is a monthly report, showing the total sales and use of gasoline, and that portion of the total sales and use which is exempt for taxation, including such items as non-highway use and import sales and inventory which shows the total inventory on hand at the beginning of the month, the quantities manufactured or received and quantities sold or other-

(Testimony of Virgil M. Lyles.)

wise disposed of, and the closing inventory. Of course, when we come to audit the distribution, which is the refinery, we get detailed information as to purchases and sales. [109]

Q. During the period of gas rationing was any supplemental report filed with the State Board of Equalization?

A. During the period of rationing there was, I believe, an extra copy of the distributors' reports submitted to the State Board of Equalization, and there was a report to the OPA. The two of them being checked in the office of the Board of Equalization to see if they agreed and then forwarded to the OPA.

Q. Forwarded by the State Board of Equalization to the OPA? A. That is right.

Q. No, if Mr. Lockwood had been able to show you when you made your audit of his books and records, the source of the total number of gallons which his records showed he had sold, would you have proceeded to collect the tax then from the vendor of that gasoline to Mr. Lockwood?

Mr. Cobb: Object to that on the ground it calls for a conclusion.

The Referee: I think so.

Mr. Stevens: It is the same question that counsel asked.

The Referee: Well, "presumed"—I will sustain the objection. If he had known of any violation he would have gone after it. The question is did he sell all of this stuff and did he pay the tax, not

(Testimony of Virgil M. Lyles.)

what this gentleman might have [110] done if he heard someone violated the law. I don't see much use in going over this. You are just telling the story twice. You asked him certain things this morning and I remember what he said.

Mr. Stevens: Your Honor, what I am attempting to do is to go into matters which Mr. Cobb went into on cross-examination and was permitted to do so by your Honor.

The Referee: Well, twice told tales are sometimes effective, but I can remember things for 24 hours, and I remember what this gentleman said this morning. Now, if you have something new I will be interested in it.

Mr. Stevens: I have no further questions at this time.

The Referee: All right. That is all. Now, you have another witness?

Mr. Stevens: I do have one matter further. I am sorry to call this witness back.

The Referee: All right.

Q. (By Mr. Stevens): In Claimant's Exhibit 3, just to make the record clear, can you identify this white sheet dated 7-31-45, and signed C. N. Wakefield and witnessed by H. S. Williams?

A. That is a copy of the physical inventory taken by Mr. Williams and Mr. Wakefield; a copy of which was furnished to me at the time of Lockwood's stock on hand on July 31, 1945. [111]

Q. That is one to which you have referred in your testimony?

A. That is right.

Mr. Stevens: I would like to call Mr. Mark Lickter to the stand.

The Referee: All right.

MARK LICKTER

called as a witness on behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. By whom are you employed?

A. By the State Board of Equalization.

Q. What is your position?

A. Auditor in the brokers' department of the Division of Motor Vehicle Fuel Tax Department.

Q. How long have you been engaged in that work? A. In this particular department?

Q. Yes. A. About 10 years, I guess.

Q. As an auditor? A. Yes, as an auditor.

Q. Did you make an audit of the books and records of Arlie Lockwood, the debtor in this proceeding, for the period from January 1, 1946, to and including August 31, 1946?

A. I did. [112]

Q. Have you your work sheets that you used?

A. I have.

Q. You prepared those in making your audit?

A. I did.

Q. And in making your audit did you find any—did you recommend that an additional tax be assessed for the months in that period?

(Testimony of Mark Lickter.)

A. I did.

Q. What are those two months?

A. April and May, 1946.

Q. Let's consider the month of April, 1946. Will you state what your audit disclosed for that month?

A. It disclosed a gain of 20,988 gallons.

Q. Will you go through it and explain in detail just how you arrived at that gain?

A. The report form 19 of Mr. Lockwood's showed sales during that month of 129,457 gallons.

Mr. Cobb: What month?

A. During the month of April. My audit disclosed that they omitted Invoice No. 00120, amounting to 739 gallons; Invoice 00121, amounting to 208 gallons; Invoice No. 03046, amounting to 7,050 gallons; Invoice 03405, amounting to 7,050 gallons; Invoice 03047, amounting to 7,000 gallons.

Q. And that resulted in the overage of gasoline sold as compared to the amount of gasoline to be accounted for as [113] shown by the books and records of the taxpayer?

A. That resulted in a gain of 20,988 gallons.

Q. Explain what you mean by gain, will you?

A. We opened with an inventory of 19,914, which was Mr. Lockwood's closing inventory of March and opening inventory of April, 1946. The purchases agreed with his reported amount, or 116,126 gallons, making a total of 136,040 gallons. Our sales, according to our audit, amounted to 150,560 gallons. The closing physical inventory was 6,468 gallons, making a gain of 20,988 gallons.

(Testimony of Mark Lickter.)

Q. Did you verify the sales covered by the invoices to which you have testified? A. I did.

Q. With records of the vendees?

A. With records of the vendees, yes, sir.

Q. Will you state what you found?

A. I found those invoices, copies of those invoices of the Dependable Oil Company to A. L. Fenton at 2801 West Olympic Boulevard, Los Angeles, Service Station; April 2, 1946, Invoice 03405, 7,050 gallons, substantiated by a hauling ticket from Roberts Tank Line No. 9181, as delivered from Dependable Oil Company to A. L. Fenton. April 2, 1946, Invoice 03406 for 7,050 gallons of gasoline sold to Al Fenton by Dependable Oil Company.

Q. Both the same date?

A. That is right, your Honor. [114]

The Referee: All right.

The Witness: And with the delivery ticket from Roberts Tank Line, No. 9143 for the same amount of gasoline. Pardon me, there was two delivery tickets, 9143 and 9144, and on the second, 00121, Dependable Oil Company sold Al Fenton 208 gallons of gasoline, and on April 2nd again, 00120, Dependable Oil Company sold Al Fenton 739 gallons. I have a cancelled check from Victory Petroleum Agency, doing business as A. L. Fenton, amounting to \$1,568.42, in payment of these invoices. There is also attached a memorandum by Al Fenton's office showing that this gasoline was delivered to four of his stations. Here is another one. I also have an invoice numbered 03407 for

(Testimony of Mark Lickter.)

April 2, 1946, by Dependable Oil Company to Jack Pomeranz, 601 North Vermont, Service Station, for 7,000 gallons, with delivery ticket from Roberts Tank Line, No. 1788, and a cancelled check from Dependable Oil Company dated April 3rd, for \$735.

Q. (By Mr. Stevens): Now, state what you found for the month of May, 1946.

A. For the month of May we found a difference in our audit of 2,900 gallons, a gain of 2,900 gallons.

Q. Would you go through that item by item and state what you found?

A. We found that an error was made in their sales record whereby 2,900 gallons was added to the sales record but was not included in the total in the footing of that [115] record.

Q. And otherwise the figures you found were the same as those reported but for that one error in addition? A. That is right.

Mr. Stevens: That is all.

Cross-Examination

By Mr. Cobb:

Q. Mr. Lickter, this April 2nd sales, did you check the ledger to see if they were posted in any of the ledgers or sales records of the Lockwood Oil Company?

A. They were not. You are referring to April 2nd?

Q. Yes, sir.

A. No, they were not included in the sales record that I checked.

(Testimony of Mark Lickter.)

Q. You checked to see if there were any like figures and amounts posted in the sales record, did you? A. I did.

Q. You did that personally? A. I did.

Q. What records did you make that check on?

A. You mean the sales records?

Q. Any records.

A. On their sales invoices and checked to their sales record.

Q. Well, the sales records at that time consisted of what? [116]

A. It consisted of a sales journal.

Q. And you found no postings in the sales journal that corresponded to these figures?

A. No.

Q. Did you find a record of a sale to the Victory Petroleum Products Company about that date of a similar amount?

A. Well, there were other sales to the Victory Petroleum Company during that month.

Q. Did Mr. Lockwood or the bookkeeper tell you that in respect to these invoices that Mr. Fenton asked him to change the delivery to the Victory, or that the Victory asked them to change it to Fenton? A. No.

Q. Where did you find these sales records covering these April 2nd transactions?

A. They were in Mr. Lynch's office.

Q. Were they in with the other invoices for that period of time?

(Testimony of Mark Lickter.)

A. No, no, Mr. Smith of Mr. Lynch's office handed me those invoices. He said he had found them in Mr. Lockwood's safe.

Q. What did you do after he handed you those invoices?

A. I entered them in my audit, included them in my audit and checked the sales record to see if they were included in that. [117]

Q. Did you just look under the name A. L. Fenton?

A. No, I knew Fenton was doing business as Victory Oil Company.

Q. But you did find sales in the month of April by Mr. Lockwood to Victory Oil Company?

A. Yes.

Q. And you found sales that were entered to A. L. Fenton also? A. That is right.

Q. Now, there was no verification for these starting and closing inventories for the months of April and May; you just took the figure that was filed on the broker's report, you took that?

A. Well, the month of May opened with a physical inventory that was taken by our investigating department.

Q. How much did they open with?

A. They closed the month of April with the amount of 6,468 gallons.

Q. How did you handle in connection with the inventory, the gasoline tanks at Mr. Lockwood's service station?

A. We didn't take that into consideration at all.

(Testimony of Mark Lickter.)

That was his retail business. We were checking his wholesale business.

Q. You knew he had a couple or three service stations, did you not? A. Yes, sir. [118]

Q. And those service stations on those dates had gasoline in their tanks? A. True; it might be.

Q. And you never took the amount that was in those tanks into consideration in connection with this figure you have given here?

A. No. I asked Mr. Lockwood if he had records of those service stations and he said he had none, so there was no way to check them.

Q. I will show you what purports to be a ledger of Mr. Lockwood's for the month of April, 1946; there is an entry to Al Fenton of \$1,829.90; did you see that record of sales?

A. I believe that refers to another sale he made.

Q. Cannot you tell?

A. Yes, if I checked the records; the total of this check is \$1,568.42.

Q. Then you had a supplemental check of gal-lonage for 208 or something?

A. That is all included in that check.

Q. Did you have any other sales records for this same period of time? A. No.

Q. If you are familiar with this book you can save me some time. Will you turn over to the record of accounts receivable under the name of Fenton or Victory Petroleum. [119]

Mr. Stevens: Mr. Lickter, don't you have in

(Testimony of Mark Lickter.)

your audit working papers a schedule of all of the sales to Al Fenton and Victory?

A. Yes, I think I have.

Mr. Stevens: I think if we could get that we can then compare that with what you found and the item Mr. Cobb is questioning on. In your working sheets you have the dates and so forth.

The Witness: Yes, everything is right here.

Q. (By Mr. Cobb): This check was put in the California Bank to the credit of Dependable Oil Company, was it not? A. Yes, sir.

Q. Well, doesn't this ledger show on that date the receipt for that sum of money? Can you help me here on the cash journal to show that?

A. That was on the 3rd of April; there is nothing there.

Q. You are looking at January?

A. That's right.

Q. February is the last entry in there?

A. Yes, sir.

Q. Do you know whether or not the books were posted up to the month of April, Mr. Lockwood?

Mr. Lockwood: I thought this year's books were complete up to August 31st. I am quite sure there were. There is an accounts receivable book out there, I believe, and also [120] an accounts payable book.

Q. (By Mr. Cobb): Do you know where the bank records are of the Lockwood account here in this book?

(Testimony of Mark Lickter.)

A. No, I don't. I didn't go into that.

Mr. Stevens: You have there a copy of the sales record, don't you? And you also have Mr. Whitaker's audit working sheets for that month; can't you compare those two figures?

Mr. Cobb: The only cash record for April, 1946, under Al Fenton, \$1,829.90, is that right?

A. That is right according to that book, but that does not represent these purchases.

Q. It is larger than the total purchases?

A. That is right. That is for other purchases.

Q. Did you check to see some other purchases?

A. I did at Fenton's; also other checks and other invoices.

Q. Did he buy any other merchandise from Mr. Lockwood in that month? A. Yes, sir.

Q. Do you know how much that amounted to?

A. Yes. Al Fenton's total purchases from Lockwood in that month was 42,117 gallons.

Q. Well, what is that in dollars and cents?

A. That I don't know.

Q. Well, didn't you ask him—you got one check for [121] \$1,500, didn't you get checks for his other purchases?

A. No, because those agreed with our sales.

Q. All right. If it agrees, where are the other figures that it agrees with for that month?

A. Where are the other figures?

Q. Yes.

A. Well, it agrees on the other purchases, on both of the amounts here. These are the invoices

(Testimony of Mark Lickter.)

that represent these sales here; all of these other purchases or sales to Fenton—those amounts will agree.

Q. Well, where are the records that you say will agree with Mr. Fenton's records; where are Mr. Lockwood's records?

A. They must be in Mr. Lynch's possession.

Q. Did you use this ledger before you to check with Mr. Fenton's records, or what did you have?

A. No; I had the invoices; in other words, these invoices I have here checked with Mr. Fenton's records.

Q. What you did was to take the invoices to Mr. Fenton; the whole amount and go out and check them with Mr. Fenton's records?

A. That is right.

Q. And Mr. Fenton produced invoices No. 405 and one or two others that you didn't have from Mr. Lockwood, and that is where you discovered, in your opinion, that he didn't have invoices covering it, is that it?

A. He didn't have invoices. [122]

Q. Mr. Lockwood?

A. Yes, I found the invoices in Mr. Lynch's office covering those sales.

Q. Then how did you know they were not included on this ledger? May I have this for evidence? The witness testified about it and I want the other bookkeeper to explain the matter later.

The Referee: All right. We will mark it.

(Testimony of Mark Lickter.)

(Papers marked Debtor's Exhibit 1, 10-28-46.)

The Witness: The invoices all had invoice numbers.

Q. (By Mr. Cobb): Well, do you have the invoices that you just finished testifying to for these other sales that you made the assessment against?

A. What assessment was that?

Q. Well, you charged him, I remember on one delivery you said you found the invoices in Mr. Lynch's office and you found Mr. Fenton paid him.

A. Here it is right here.

Mr. Cobb: We will offer that in evidence, your Honor.

The Referee: All right.

(Papers marked Debtor's Exhibit 2, 10-28-46.)

Q. (By Mr. Cobb): Did you have another one?

A. No, that was all.

Q. Just those two? A. That is right.

Mr. Cobb: May I see those last exhibits, Your Honor?

The Referee: Yes, they are right here. I doubt if [123] you will be able to finish this afternoon. I suggest we take a little recess and let you look through those books and see if you can find what you want. Now when would you like to resume this? I can give you any afternoon this week.

Mr. Stevens: We would appreciate it if we can

(Testimony of Mark Lickter.)

finish this week because Mr. Lyles is going on his vacation and has been deferring it until we finish. We have a matter also on Thursday which we want to make a test suit on.

Mr. Cobb: How about Friday?

The Referee: I can give you all day Friday; no I have a case for Referee Laugharn on that day.

Mr. Stevens: Could we make it at 11 o'clock on Friday?

The Referee: Yes. We will start at 11 on Friday; November 1st, 11 o'clock. I will put those two checks together and mark them Debtor's A.

Mr. Cobb: All right. I will give them to your secretary when we have finished with them.

The Referee: All right.

(Whereupon an adjournment was taken until 11 o'clock a.m., Friday, November 1, [124] 1946.)

Friday, November 1, 1946—11 A.M.

The Referee: Well, our Lockwood matter again. You might give your appearances to the reporter.

Mr. Stevens: Daniel N. Stevens, Deputy Attorney General, appearing for Robert W. Kenney, Attorney General of the State of California.

Mr. Cobb: Francis B. Cobb, of Cobb & Utley, appearing for the Debtor.

Mr. Pines: Harry A. Pines of Dechter, Hoyt, Pines & Walsh, appearing for the Receiver, Lynch.

The Referee: Proceed.

Mr. Stevens: Call Mr. Lickter.

MARK K. LICKTER

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Cobb: May I see the exhibits offered by the Debtor?

Mr. Stevens: May I make the suggestion that since those do involve two separate sets of invoices, one to Pomeranz and one to Al Fenton, that they be marked as separate exhibits rather than just as one?

Mr. Cobb: I think we will be able to explain them.

Mr. Stevens: Could we have them marked separately? They are two different transactions. [125]

The Referee: I will mark them separately.

Cross-Examination

(Resumed)

By Mr. Cobb:

Q. In reference to these deliveries, which are evidenced by Debtor's Exhibit 1, say to Mr. Fenton, as I understand it, you were unable to determine where the gasoline was purchased by Mr. Lockwood, and you assumed it came from his storage tanks?

A. (No response by the witness.)

Q. Is that a fair statement of your position on those items?

A. No. According to the delivery tickets here, it shows that the load was received from Dependable Oil Company and delivered to Mr. Fenton.

(Testimony of Mark Lickter.)

Q. The Dependable Oil Company is Mr. Lockwood? A. That is right.

Q. Do you know whether or not it is customary for a broker, if he has oil delivered to a customer, or gasoline delivered to a customer, direct from the refinery, you still show it as coming from the plant, so the customer wouldn't know where he was buying the gasoline? A. Well, I doubt that.

Q. You doubt it? A. Yes.

Q. You never found that was the practice that Mr. Lockwood followed in his business? [126]

A. Well, I wouldn't say "Yes" or "No" on that.

Q. Now, I show you here a freight bill from the Bell Oil Company, bearing the date of 4-1-46—and it shows the receipt number—delivered to the Roberts Tank Line, and the destination is "A. E. Fenton." Also attached to it is another Roberts Tank Line receipt from the Bell Oil Company, being No. 9142, 9143 and 9144, and a Bell Oil & Refining Company Receipt No. 2507. Will you examine the gallonage, the trucking company to whom they were delivered, and the company to whom they were to be delivered, and see if, in your opinion, it does not cover the same gasoline that has been testified to in connection with Debtor's Exhibit No. 1.

A. Well, I can't seem to identify those pertaining to these loads. They are different drivers.

Q. Is that the only thing you fail to identify?

A. (No response by the witness.)

Q. Let me show you another freight bill, 12314,

(Testimony of Mark Lickter.)

and receipts giving numbers 1787 and 1788. You have looked at that Receipt No. 1788, have you not?

A. Yes.

Q. Will you examine this document, together with 1787, and the gallonage, the destination, and the parties that loaded it, and answer me whether you think that is the same gasoline that is referred to in Debtor's Exhibit 1?

Mr. Stevens: Your Honor, I object to this question on the ground there is no testimony given by this witness as [127] to whether or not in making his audit he checked into these sources, but, on the contrary, his testimony has shown that in making his audit he computed the total sales made during the period as shown by the books and records of the bankrupt, and also computed the total purchases made during that period by the bankrupt, and that he used the resulting difference as the figure which he recommended for the purpose of this assessment. I think he has no knowledge on this question.

The Referee: This is cross-examination. He has a right to find out how he arrived at these conclusions. Objection overruled.

Q. (By Mr. Cobb): In reference to Mr. Fenton's deliveries, are you able to determine whether or not it is the same? A. No, I am not.

Q. Let me ask you this: The Bell Oil Company issued, as shipper, Freight Bill No. 12314 on 4-1-46, did they not?

A. (No response by the witness.)

Q. The destination: "Jack Service, L. A."?

(Testimony of Mark Lickter.)

A. That is right.

Q. And that was covered by Receipts 1787 and 1788? Is that right?

A. According to what they show here, it is, yes.

Q. And that represented 7,000 gallons of gasoline?

A. That is right.

Q. Shipped in Truck No. L-12 and Trailer No. L-13? Is that right? [128]

A. Yes.

Q. Now, we have Debtor's Exhibit 1, which you produced, a receipt from the Roberts Tank Line, No. 1788, do we not?

A. That is right.

Q. And the amount of gasoline represented by that was 7,000 gallons, wasn't it?

A. Yes.

Q. And it was shipped by Truck No. L-12 and Trailer No. L-13?

A. That is right.

The Referee: On the same dates, Mr. Cobb?

Mr. Cobb: Date loaded 4-2-46 on Debtor's Exhibit 1, and the bill of lading is dated 4-2-46. The top of the freight bill bears date 4-11-46. I presume that was the date that it was made out, but the date of shipment, apparently, is the same in both.

Q. (By Mr. Cobb): You wouldn't say that was the same shipment of gasoline that was referred to in Debtor's Exhibit 1?

A. No.

Mr. Cobb: May I have this marked as Debtor's Exhibit next in order, being the shipping receipt—

Mr. Stevens: I object to that on the ground that there has been no showing of the validity of these documents, whether they are documents of the Bell Oil Company. This [129] witness can't identify those.

(Testimony of Mark Lickter.)

The Referee: I will overrule the objection. I want to get to the bottom of this without so many technicalities. I want to find out who owes who and how much. I want to find out what the truth is here. All right. You may have that marked. I don't know what the number is, and we will check it later on.

Q. (By Mr. Cobb): Let us turn to the Roberts Tank Line Receipt 9143, attached to Debtor's Exhibit 1, and let me hand you a freight bill of Bell Oil Company, 12312 and which contains receipt No. 9143, 9142, and 9144. Your exhibit also has attached 9143 and 9144, has it not?

A. (No response by the witness.)

Q. In other words, you have 9143 and 9144?

A. Yes.

Q. The amount of gallonage shown in this freight bill is 7,050 barrels, is it not?

A. No, it is 7,050 gallons.

Q. I mean gallons. Pardon me. It bears date of 4-1, does it not? A. It does.

Q. And this exhibit offered bears date of 4-1, does it not? A. That is right.

Q. And your exhibit bears the signature of Mr. A. Holt, and the attached Roberts Tank Line also bears the [130] signature of A. Holt, as well as another signature? Is that correct?

A. That is right.

Q. Your exhibit doesn't contain 9144 referred to in the exhibit that I have handed you, does it—yes, it does. Pardon me. And that is for 2,800 gallons,

(Testimony of Mark Lickter.)

and this exhibit is 2,800 gallons? Is that right?

A. That is right.

Q. And both of them are signed by Mr. Holt?

A. Yes.

Q. Would you say that is the same gasoline that is referred to in Debtor's Exhibit No. 1?

A. Well, it appears to be the same, yes.

Mr. Cobb: We will offer this as Debtor's Exhibit next in order.

Mr. Stevens: I object to that evidence on the ground that no proper foundation has been laid, no showing as to the validity of those documents or that they come from the records of the Bell Oil Company.

The Referee: Objection overruled. They will be received.

Q. (By Mr. Cobb): In Debtor's Exhibit 1 you have "Roberts Tank Line, No. 9181," made out to the Dependable Oil Company and signed by Mr. Hahn, representing 7,050 gallons? Is that correct?

A. That is right. [131]

Q. Now, I show you Freight Bill 12313 with the notation, "Receipt No. 9180 and 9181," representing 7,050 gallons, to which is attached a breakdown of the gallonage, 2,750 in Truck No. 7 and 4,300 in Truck No. 4-A, and ask you if the gallonage and breakdown and trucks do not compare with your exhibit, Debtor's Exhibit 1?

A. Freight Bill 9180 is not included in this. Freight Bill 9181 is, and it shows a total of 7,050 gallons.

(Testimony of Mark Lickter.)

Q. In other words, under your test and your tax you charged Mr. Lockwood for 7,050 gallons, did you not? A. No.

Q. What gallonage did you charge him for in connection with this Debtor's Exhibit 1 in connection with that transaction?

A. We didn't charge him with anything. I didn't charge him with anything.

Q. Well, you made an assessment on 7,050 gallons, which was delivered to Mr. Fenton, that you didn't find in his records? Wasn't that your testimony?

A. I made an audit showing that difference, yes.

Q. So I have produced 9180 and 9181, while you just produced 9181, didn't you?

A. That is right.

Q. And would you say that as to 9181 that is the same gasoline that is shown in your exhibit?

A. That appears to be about the same. [132]

Q. Why do you say "about"? Isn't it signed by the same men, the same trucks, the same gallonage, and the same date and everything? Isn't that right?

Mr. Stevens: I object to the question, calling for the conclusion of the witness.

The Referee: He is looking at the document. How does it call for a conclusion?

Mr. Stevens: He doesn't know what those documents represent.

The Referee: Overruled. When a man looks at a thing he ought to know what is on it.

(Testimony of Mark Lickter.)

Mr. Stevens: I object, because what he is looking at doesn't say what is on it.

The Referee: That is overruled, too.

The Witness: That seems to be a carbon copy.

Mr. Cobb: At this time we offer Freight Bill 12313 and attached delivery slips as an exhibit next in order.

Mr. Stevens: I object to this evidence for the same reason I objected to the last couple of exhibits.

The Referee: The same ruling. That will be A-3.

Q. (By Mr. Cobb): With respect to this overage, excess sales and purchases, do you have any of the details supporting those overages like you produced in the form of Debtor's Exhibit 1?

A. To give you a reconciliation——

Q. I am not interested in a reconciliation. I asked [133] you before: Do you have any details upon which you based your assessment in 1946, which you produced in your Debtor's Exhibit 1, showing these deliveries to Mr. Fenton and to Mr. Pomeranz?

A. (No response by the witness.)

Q. Now, I want to know if you have any of the other assessments, any of the delivery slips or the receipts from the stations, identifying the particular gasoline which you claim that a tax was not paid on?

A. During what period?

Q. During any period. In other words, I can't take your conclusion in this audit and go and dig up

(Testimony of Mark Lickter.)

the companies to show this gasoline was procured from the Bell Oil Company, unless you tell me or show me some delivery date or consignee, like you did, for example, in Debtor's Exhibit 1.

The Witness: May I, your Honor, see that first exhibit?

Mr. Cobb: Here is Debtor's Exhibit 1, if that is it (handing document to the witness).

The Witness: That is it. No, that is not it.

The Referee: There are three of them (handing documents to the witness). I don't know which one you want. Did you find it?

The Witness: Yes, sir. Thank you.

Q. (By Mr. Cobb): Are you able to answer whether you have any other documents showing any particular delivery that [134] is included on your recommendation for tax assessment?

A. Well, I referred it to this Exhibit No. 1-A here, which shows delivery tickets 1787 and 1788 for 7,000 gallons. That 1787 and 1788 are for two loads of gasoline of 7,000 gallons each.

Q. Who did you say they were delivered to?

A. One supposed to have gone to Fenton, and the other one to Pomeranz, but the——

Q. (Interrupting): I want to know if you have got any other shipment or any other transaction that you have any information on, showing dates of delivery, to whom delivered, or the trucks that delivered it, so that I can go out and dig out the records to explain where the gasoline came from.

A. No, no others.

(Testimony of Mark Lickter.)

Q. Now, the Bell Oil Company, they are a refining company, are they not? A. I believe so.

Q. And they operate in Santa Maria?

A. They used to.

Q. Do you know whether or not they pay taxes on gasoline that they sell from their refinery?

A. I do not.

Q. They are a manufacturer of gasoline in the State of California?

A. I believe so. I have never been out [135] there.

Q. And if they are a manufacturer of gasoline and someone purchases gasoline from them, would you personally assume that the tax would be paid to the State of California on such a purchase?

Mr. Stevens: I object to the question on the ground that it calls for the conclusion of the witness.

The Referee: I think so, Mr. Cobb. We are going into the realm of conjecture now. Objection sustained.

Mr. Cobb: No further cross-examination.

The Referee: All right. Any other questions?

Redirect Examination

By Mr. Stevens:

Q. The Pomeranz and Fenton invoices and cancelled checks, which are included in Debtor's Exhibit 1 and 1-A represent the amount of motor vehicle fuel which you added to the total figure of motor vehicle fuel sold by the debtor because you could not

(Testimony of Mark Lickter.)

find any record of the sales covered by those two transactions in the books and records of the debtor? Is that not true? A. That is true.

Q. Those sales were set up as additional sales for the month of April, 1946? Is that not correct?

A. That is true.

Q. Now, with respect to the month of May, the items which you made in your audit to the total sales reported to have been made of motor vehicle fuel by Mr. Lockwood was the [136] result of an error which you found in the books—the sales records of Mr. Lockwood in the amount of 2,920 gallons of gasoline? Is that true? A. That is right.

Q. So, in that instance you made no search for any additional invoices? A. That is right.

Mr. Stevens: That is all.

Recross-Examination

By Mr. Cobb:

Q. Do I understand that if you find an error in the books, or a man doesn't put something down in his books, you go ahead and assess him three cents a gallon for the transaction, whether or not any gasoline was sold or delivered?

A. No, I don't.

Q. You recommed it?

A. I make my report and submit my audit.

Mr. Cobb: That is all.

(Witness excused.)

The Referee: Have you got another witness?

Mr. Stevens: Yes, I do.

The Referee: Let us have him.

Mr. Stevens: Call Mr. Wakefield. [137]

CLARENCE M. WAKEFIELD

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Wakefield, by whom are you employed?

A. The State of California.

Q. Your position?

A. Investigator, Fuel Division.

Q. For what department?

A. For the Fuel Division.

Q. For what department?

A. Board of Equalization.

Q. How long have you occupied that position?

A. Oh, approximately 12 years.

Q. Did you take an application for license as a broker of motor vehicle fuel form to Mr. Lockwood in April, 1944?

A. Yes, I did.

Q. I show you a paper here headed: "Office of the State Board of Equalization, Sacramento, California. General Order No. 4. Re: Broker's License and Records," and ask you if you can identify this document?

A. Well, I don't know that I can identify this particular one, but this is one that we include, this type, or a copy, with each application. [138]

Q. Did you take a copy of that form to Mr.

(Testimony of Clarence M. Wakefield.)

Lockwood at the time you took him this application and hand it to him at that time?

A. That is included with the application. We always give them a copy of General Order 4.

Q. Did you give him such a copy?

A. Yes. That was attached to the application.

Q. And accompanying that form was there also attached the additional two sheets attached to the sheet which you have just identified, designated, "Purchase Record," and "Sales Record"?

A. Yes, sir. Those two sheets, with each, comprise part of General Order 4. One shows "Purchase Record," and the other shows "Sales Record."

Q. The form of record which the dealer is required to keep in reporting sales and purchases of gasoline?

A. Yes, general outline how to keep their records.

Mr. Stevens: I would like to offer this as Claimant's next exhibit.

Mr. Cobb: I think it is irrelevant and immaterial. The Act doesn't provide any penalty, except revocation of license. It would have no bearing on the issues in this case, whether he sold gasoline without paying a tax.

The Referee: I don't see how it will do much good or much harm. I will admit it. Claimant's Exhibit 1-A of this date, 1-A, November 1st. All right. You give him the papers [139] for the next question.

Mr. Stevens: That is all.

Mr. Cobb: No cross-examination.

The Referee: All right, Mr. Wakefield. That is all.

(Witness excused.)

The Referee: Any other witnesses?

Mr. Stevens: Yes. I would like to call Mr. Williams.

HAROLD S. WILLIAMS

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, did you take an inventory of the motor vehicle fuel, kerosene, stove oil, and Diesel oil in the storage tanks at the bulk plant located at Bell on July 31, 1945?

A. Yes. Investigator Wakefield and myself, accompanied by Mr. Lockwood, took an inventory on that date.

Q. What did you do first in making this inventory?

A. When Mr. Wakefield and I arrived at Mr. Lockwood's plant to take the physical inventory, we asked Mr. Lockwood for his gauging equipment. He said that he had none, that he had never taken a physical inventory of his petroleum products. So, we went to our car and obtained the guage—we proceeded to our car and obtained our gauging equipment. [140] We proceeded to measure—Investiga-

(Testimony of Harold S. Williams.)

tor Wakefield and myself measuring and Mr. Lockwood witnessing the measurements—the various amounts, in inches, in the various storage tanks at the bulk plant, measuring the amount of water, if any, and taking the temperature of the particular petroleum product in each tank.

Q. Did you calculate the net quantities of petroleum products on hand in the various storage tanks?

A. When we asked Mr. Lockwood for a calibration instrument, he said he had none. We thought it was necessary for us to calibrate the tanks, to measure the miscalibration, water, how much was held in each tank. In order to do so, you have to measure the circumference of the tank and to deduct—the average circumference of the tank with a tape, and get the thickness of the steel, and then get the interior diameter, and thus to measure the capacity in inches and fractions thereof. We did this and then were able to ascertain or calculate our gauges of inches into the actual number of gallons, net, at 60 degrees, which we use to calculate petroleum products. We then made a copy of the inventory, which was signed by Mr. Lockwood, Investigator Wakefield, and myself. We gave the duplicate to Mr. Lockwood, which included a tank stripping as quoted on the calibration for him to use when he gauged his tanks in the future. The copy of the inventory I have seen with the broker's monthly reports that are in Receiver Lynch's file. [141]

Q. I will show you a copy of the inventory which

(Testimony of Harold S. Williams.)

is in Claimant's Exhibit 3, the copy of the inventory which Mr. Lyles has previously identified as being the one he used, as representing the physical inventory taken on the close of business July 31, 1945, and ask you if you can identify that?

A. Yes, that is my signature on the bottom of it after Investigator Wakefield's, and Mr. Lockwood's signature is barely perceptible on this copy, but it is there.

Q. What did you find at Mr. Lockwood's plant with respect to instruments for measuring the amount of gasoline or motor vehicle fuel products in the various storage tanks?

Mr. Cobb: It is immaterial.

The Referee: The witness said, "None," said he had no instruments.

Mr. Stevens: I hadn't heard that mentioned, otherwise I wouldn't have gone into that.

The Referee: Best you listen. He just said that less than 10 seconds ago.

Q. (By Mr. Stevens): Will you state what you found with respect to the tank in which you found pressure appliance fuel?

A. Before we gauged each storage tank we asked Mr. Lockwood what the product in each tank was. We came to two different small storage tanks, in which I understood he had pressure appliance fuel. We asked him when he put this [142] product in for sale. He stated he had received his first delivery that day, July 21st, a truck and trailer load. Upon calculating the quantity on hand we found that

(Testimony of Harold S. Williams.)

there was approximately 7,200 gallons—seventy-one or seventy-two hundred gallons. I don't know exactly the figures, without looking at the inventory.

Q. In order to have that correct, will you look at the inventory?

A. 4,380.2 gallons in one tank, and 2,751.7 in the other tank, or a total of 7,831.9 gallons.

Q. Did you have a conversation with Mr. Lockwood with respect to the difference in these two figures?

A. Mr. Lockwood, having told us that he had received a truck and trailer, approximately 6,300 gallons of pressure appliance fuel, we asked him how he accounted for this overage, and he stated that the storage tanks had formerly held kerosene, and there was a considerable quantity of kerosene, which amounted to approximately 800 gallons, in the two tanks, and he had not bothered to pump the kerosene—he just pumped in the tax-paid motor vehicle fuel on top of the kerosene, which is not the usual procedure of anybody in filling storage tanks.

Q. Can you give the exact figure?

A. I have seen the inventory and audit figures. The audit figure was 792 gallons difference.

Q. Mr. Williams, were you in court on Monday when [143] Mr. Cobb asked Mr. Lyles on the stand whether Mr. Lyles knew of any source of gasoline which a broker could obtain except through licensed distributors and refiners?

A. Yes, I remember that.

Q. I am going to ask you that same question:

(Testimony of Harold S. Williams.)

Do you know of any source of gasoline during the period of these audits where a person could obtain gasoline other than from a licensed distributor?

A. Well, we had many cases that we brought to a conclusion——

Mr. Cobb: May I have the question answered, when and where and the party's name?

The Referee: We will get all that.

Mr. Cobb: But not his experience.

Q. (By Mr. Stevens): Answer the question directly? A. Yes.

Q. Will you state your knowledge in that regard?

Mr. Cobb: We object on the ground that his knowledge is ambiguous and uncertain.

The Referee: Mr. Cobb, you opened the door when you asked that question of Mr. Lyles. So, I am going to let this man answer. Objection overruled.

The Witness: Judge, I am not at liberty to tell the name of the individual in any cases unless I had instructions, but I can tell you what cases, what they amounted to, and how they were arrived at. [144]

The Referee: The question is do you know of any source where a person might purchase gasoline other than at a licensed refinery?

A. Yes. I answered it, "Yes."

The Referee: State what those sources were?

The Witness: During the war there were four principal sources, from which many of our cases developed, and which resulted in determinations and

(Testimony of Harold S. Williams.)

assessments for tax collection as unlicensed distribution, the first one being motor vehicle fuel that was sold by licensed distributors, as taxed, to a Federal Government Agency, particularly the Military Department. We worked very closely with the F.B.I., and numerous cases in which stolen gasoline was turned up, and one of the sources of untaxed motor vehicle fuel was available during the war in the State of California, when gasoline was particularly short and was withheld from the motoring public, who were willing to give anything for a couple of gallons extra, that rationing stamps didn't give them. That was source No. 1.

The second source was where gasoline was stolen directly from licensed distributors, through collusion by employees, tank truck drivers and other parties.

The third case was illegal branding of petroleum products, special selling of those products, such as paint thinners.

And the fourth was the case of the returned containers [145] that were shipped back, 50-gallon barrels, by the Military to private contractors, who reclaimed the barrels and reconditioned them for again refilling. We had one case of a private contractor who found these containers coming back from the Pacific with various quantities of motor vehicle fuel in them, and he proceeded to drain them and to accumulate an amount of over 10,000 gallons a month. In his attempt to return them to the Federal Government, the Federal Government said that

(Testimony of Harold S. Williams.)

they had no knowledge of this, that, as far as they were concerned, these containers were empty.

Again, there was the draining of airplanes, which were crated for shipment, by private contractors. Planes had to have sufficient gasoline in them for factory tests and to land the airplane. This was untaxed gasoline. These were drained and picked up by the contractor and put in containers, and they went in all directions with those particular trucks.

The Referee: In other words, there were 109 ways of beating the laws?

The Witness: That is right, Judge. That is why we have investigators and auditors.

Q. (By Mr. Stevens): Did you have a conversation with Mr. Lockwood in his office at Bell on April 22, 1946? A. Yes.

Q. Who were present on that occasion? [146]

A. Supervising Auditor Lyles, and Auditor Lickter.

Q. Will you state what you said and what any of the other parties present and Mr. Lockwood said on that occasion?

A. I was there at the request of Supervising Auditor Lyles, who reported to me that he had found this large discrepancy in gasoline sales over purchases. And he asked me if I would help him question Mr. Lockwood as to where his source of supply was, as to the apparent discrepancy. We asked Mr. Lockwood—the three of us at various times asked Mr. Lockwood for an explanation, and,

(Testimony of Harold S. Williams.)

finally, after stating he knew none, he said he would tell us the truth. And he proceeded to his safe and he produced ration books, ration stamps and ration coupons, which he said represented a very large investment to him up to the time the bomb dropped on Hiroshima, at which time the selling of gasoline without coupons to service stations, whether you have the coupons in your possession, the business went clear out the window, and the day that the war was over with Japan, and rationing was stopped, he was all finished, that was the results of his activities, and he attempted to make an explanation of the differences by stating that he had used these stamps in buying these stamps and making out invoices, which, to me, was very foolish——

Q. Just don't state your own conclusions.

A. Yes.

Q. Just what was said. [147]

A. He said to us that he was the largest, in his opinion, Black Market operator during the last six months of the war in Southern California.

Q. Did he state how much he had paid for these coupons and ration checks?

A. He stated that—as I remember, that these illegally possessed ration coupons and ration checks had cost him approximately \$30,000.

Q. Did you have another conversation with Mr. Lockwood on or about July 12, 1946?

A. Mr. Lockwood was asked to come into the office of the Supervising Auditor, Wilton, at which

(Testimony of Harold S. Williams.)

time Supervising Auditor Lyles and Auditor Weiss and myself were present.

Q. In addition to Mr. Wilton?

A. In addition to Mr. Wilton. And Mr. Lockwood gave us the same explanation at that time and approximately the same statements, except that he did not have the bundle, a large bundle, of ration stamps and coupons in his possession.

Cross-Examination

By Mr. Cobb:

Q. Mr. Williams, are you a mining engineer?

A. Previously I was. I happen to hold a degree of mining engineering.

Q. You were out to see Mr. Lockwood just before the meeting, in which you wanted to act as engineer for him in connection with a gold [148] mine?

Mr. Stevens: I object to that—

The Witness (Interrupting): I will tell you the whole conversation. I didn't offer Mr. Lockwood anything at all. I told Lockwood I would be interested in seeing any mining property. He showed me some gold samples.

Q. (By Mr. Cobb): Didn't you offer to put yourself on his payroll? A. I did not.

Q. Nothing was talked about money?

A. Nothing talked about anything like that. He suggested that he would take me in his airplane to look at the property.

Q. He told you in both of these conversations

(Testimony of Harold S. Williams.)

that he never sold any gasoline that he had not purchased from a legitimate refiner, too, didn't he?

A. That was materially his statement. He did state, however, that if he could tell what actually happened he would involve so many others who would—just what he said: He was out on a limb.

Q. He told you that he had made out invoices evidencing sales in order to acquire coupons? Isn't that right?

A. That was his statement.

Q. And that, as a matter of fact, he told you he hadn't sold any gasoline that he hadn't purchased from a legitimate refiner who had paid the tax on it?

A. He stated that, yes. Naturally he [149] would.

Mr. Cobb: That is all.

The Referee: Mr. Lockwood told you that he made out false sales tickets in order to acquire ration stamps?

The Witness: That was his statement, Judge.

The Referee: That is all.

(Witness excused.)

The Referee: It is 12 o'clock, and I will see you at two.

(Whereupon a recess was taken until 2 o'clock p.m.) [150]

Friday, November 1, 1946. 2 P.M.

The Referee: All right, gentlemen. Let us proceed.

Mr. Stevens: Are you through with your cross-examination?

Mr. Cobb: Yes. He asked if he could be excused, and we excused him.

Mr. Stevens: May it be stipulated, counsel, that these (indicating) are copies of Mr. Lockwood's brokerage reports filed by him during the period from January 1, 1946, to and including the month of August, 1946?

Mr. Cobb: Yes, I so stipulate.

Mr. Stevens: I would like to offer these, your Honor.

The Referee: All right.

Mr. Stevens: Claimant's next in order.

The Referee: Claimant's A-5.

Mr. Stevens: I have a few questions I would like to ask Mr. Lockwood.

ARLIE R. LOCKWOOD

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Lockwood, are you licensed as a broker of [151] motor vehicle fuel under the Motor Vehicle Fuel License Tax Law of California?

(Testimony of Arlie R. Lockwood.)

A. I was, I think, until August 31st. I don't know whether my license was revoked at that time or not.

Q. When were you first licensed as such broker?

A. I couldn't tell you the exact date.

Q. Approximately April, 1944, on through August, 1946?

A. I was under the impression I was a broker before that time, but I am not positive.

Q. Are you licensed as a distributor of motor vehicle fuel under the Motor Vehicle Fuel Tax Law of the State of California? A. No.

Q. Mr. Lockwood, would you give us the notices of determination which were mailed or served upon you by the State Board of Equalization?

Mr. Cobb: I have them attached to my file. Don't you have a copy?

Mr. Stevens: I have certified copies. We want them introduced.

Mr. Cobb: You may use that (indicating).

The Referee: They were marked for identification?

Mr. Stevens: They were marked for identification, Exhibit 1 for Identification.

The Referee: All right, sir. Here they all [152] are.

Mr. Stevens: Perhaps they are still in here (indicating). I don't know where this came from (indicating).

The Referee: I don't know what it is, sir. I didn't bring it in.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: Your Honor, do you have the hearing with Mr. Lynch? This is marked Receiver's Exhibit for Identification No. 1.

The Referee: Let me see what it is.

(Document handed to the Referee.)

The Referee: This is a check. I don't know how it got in there.

Mr. Stevens: That hasn't been introduced in this proceeding?

The Referee: No.

Mr. Stevens: Counsel, here are these photostatic copies of the determination (handing documents to counsel). Do you prefer to have those rather than file copies?

Mr. Cobb: I will stipulate that these were served on Mr. Lockwood on or about the 23rd, wasn't it?

The Witness: September?

Mr. Stevens: I guess it must have been September 25th.

The Witness: They came at various times. I don't think they all came at one particular date.

The Referee: What are they, determination certificates? [153]

Mr. Pines: Some dated October 1st.

Mr. Cobb: I will stipulate you may use photostatic copies in lieu of the originals, and that copies of these were served upon him, unless you stipulate on the date, because I don't know it. I understand it was somewhere around the 23rd or the 25th of August.

(Testimony of Arlie R. Lockwood.)

Mr. Stevens: There was only one which was served on that date. That was one which shows the first amount, \$27,799.22. That was the only one, as I understand, which was served personally. And I think Mr. Williams already testified that was served on August 23rd, 1946. The others were served by mail. And, as a matter of fact, they allowed 10 days after service by mail, together with additional time for the mail to get from Sacramento down to Los Angeles. Since this shows date November 1, 1946——

Mr. Cobb: (Interrupting): Other than the first one, they were all filed after the filing of this proceeding?

Mr. Stevens: Yes. I will stipulate they were all mailed to Mr. Lockwood after the date of the filing of this petition, the other three.

The Referee: Up to date, if Mr. Lockwood owes you any taxes at all, it is what is shown by those documents?

Mr. Stevens: That is right.

Mr. Cobb: Yes.

The Referee: Whether they were filed during this proceeding or before it? [154]

Mr. Stevens: Yes.

Mr. Cobb: Yes.

Mr. Stevens: May that be marked——

The Referee (Interrupting): Claimant's No. 6.

Q. (By Mr. Stevens): Did you turn over all of your books and records to Mr. Lynch, the Receiver in this proceeding? A. Yes.

Mr. Stevens: That is all.

Mr. Cobb: That is all.

The Referee: All right, Mr. Lockwood.

(Witness excused.)

Mr. Stevens: For the purpose of the record, your Honor, I would like to have made a part of the record the petition filed on behalf of Lockwood as Debtor for an arrangement under Chapter IX.

The Referee: That is part of my official records. I am bound to take cognizance of them. You can introduce them by reference.

Mr. Stevens: Thank you.

The Referee: All right. What is the next move?

Mr. Stevens: That is all, your Honor.

Mr. Cobb: Take the stand, Mr. Lockwood.

ARLIE R. LOCKWOOD

the Debtor, called as a witness in his own behalf, having been previously duly sworn, resumed the stand and testified as follows: [155]

Direct Examination

By Mr. Cobb:

Q. Mr. Lockwood, during the calendar year 1945 and the calendar year 1946 did you at any time purchase any gasoline from any company that was not a licensed distributor in the State of California?

A. No.

Q. What were the companies you purchased from?

A. There was the Shell Oil Company, Elm Oil

(Testimony of Arlie R. Lockwood.)

Company. And I think I purchased from the Exeter Distributors, or Exeter Sales Company. Westland Oil Company. Hal Nelson. He was a broker. And Sunray Refining Company.

Q. What was your practice in respect to a service station that desires to buy gasoline from you? Would you receipt that or have the transportation company receipt that as showing the refinery where you picked it up, or would you show it from your place of business in Bell?

A. Well, on the road they went directly from the refinery to a service station. We always used what we called "duplicate billing." The transportation company would show a ticket from the refinery to my plant, and then make out another ticket for the benefit of the customer from my plant to the station, so that the customer wouldn't know, necessarily, where the gasoline came from.

Q. The gasoline would be moved by the trucker directly from the refinery to the service [156] station?

A. Yes.

Q. It wouldn't go to your bulk plant and be unloaded and then reloaded?

A. No.

Q. And in that instance the purchaser would have a receipt showing that he had received gasoline from the Dependable Oil Company?

A. That is right.

Q. And then there would also be a receipt outstanding, showing a sale by the refinery to you with delivery to the—a certain transportation company?

(Testimony of Arlie R. Lockwood.)

A. That is right.

Q. Now, at the conclusion of the last hearing there was some documents offered as Debtor's Exhibit 1, and you were requested to examine the records and determine where the gasoline that was delivered to Mr. Fenton, as shown on Debtor's Exhibit 1, came from, and I believe you handed to me this morning certain shipping records of the Bell Oil Company.

A. That is right.

Q. And these freight bills and Roberts Tank Line receipts and the Bell Oil Company's receipts, were they all issued in connection with the sale and the delivery of gasoline?

A. Yes.

Q. And these documents are the copies—or, the [157] original documents issued in connection with the transactions?

A. Yes.

Q. And the delivery to the Fenton Oil Company that is shown on Debtor's Exhibit 1, that is the same gasoline that is covered by these delivery slips from the Bell Oil Company?

A. Yes.

Mr. Stevens: I think there are three or four dates involved. If you want to compare them, April 1st, 2nd, and——

The Witness: I might explain those, if you want me to.

Mr. Stevens: I think the document shows the date.

Q. (By Mr. Cobb): Now, the gasoline that was purchased for distribution during the calendar years 1945 and 1946, was that all tax-paid gasoline?

A. Yes.

(Testimony of Arlie R. Lockwood.)

Q. And the price that you paid for the gasoline included a three-cent State and a one-cent Federal tax?

A. Cent and a half Federal tax.

Q. Cent and a half Federal tax?

A. Yes.

Q. Now, in respect to gasoline in water: Water is everywhere, is it not?

A. Yes, it is.

Q. Gasoline will stay on top of the water in a tank? [158]

A. That is correct.

Q. How about kerosene?

A. Kerosene is heavier than gasoline.

Q. And gasoline will stay on top of that?

A. Yes.

Q. And where you have a tank bottom, that is, the fluid below the level of the drainage nozzle, what is that material, or what constitutes that tank bottom?

A. Well, it is always the heavier product. If there happens to be water in the tank, it will stay on the bottom, and if kerosene is put in that tank and it is pumped down below the outlet, and another lighter material is pumped in, it will remain on the bottom.

Q. And when you sell the product, after it has stood in the tank, when you exhaust this fluid down to the drain nozzle, you would still have a heavy compound mixture on the bottom?

A. That would be difficult to determine exactly, unless tests were made, but it is a fact, I know, that the heavier liquid will remain on the bottom.

Q. This pressure fuel, what is the composition of that?

(Testimony of Arlie R. Lockwood.)

A. Well, it is a product that has practically the same specific gravity as gasoline. In some cases—many cases it is even lighter than gasoline.

Q. And it is lighter than kerosene, is it? [159]

A. Yes, sir.

Q. And what is the use for which that is used?

A. That is used as a pressure appliance fuel for light Coleman stoves or pressure gas stoves and so forth.

Q. In connection with your business were there any instances where you would buy gasoline from a broker and bill the broker and then have instructions to bill it direct to some station operator?

A. Yes.

Q. And that would result, in so far as your records go, in two billing invoices, would it?

A. Yes, it would.

Q. Did you have difficulty with your bookkeeping department in connection with matters of that character? A. Yes, I did.

Q. Would there be instances where the driver would deliver gasoline to service station tanks and issue billings for that gas delivered? A. Yes.

Q. And if the party didn't pay cash, would you later then have to call on him, or would you call on him in the course of business, to collect for that gas? A. Yes.

Q. Were there any instances on the second occasion that you would issue another invoice when he would pay you the money? [160]

(Testimony of Arlie R. Lockwood.)

A. In many instances, yes.

Q. Then when you would go back to the office what would you do in respect to the cash and the invoice that was issued as a second invoice?

A. Ordinarily I would turn it into the bookkeeper with the money, showing the money with the receipts.

Q. And the copy you would give to the driver——

A. The driver turned in the receipts every day to the bookkeeper.

Q. Then the bookkeeper would have two invoices on the same delivery of gasoline? A. Yes.

Q. Was there difficulty with your bookkeeper in respect to transactions of that character?

A. Well, yes, there was sometimes difficulty to determine—the bookkeeper, inasmuch as I wasn't always there, the bookkeeper wouldn't always know what the transaction was.

Q. Would he accumulate certain invoices, not knowing where to put them into the books until——

A. (Interrupting): Yes. In many instances they were not a matter of record in the books.

Q. Now, how many bookkeepers did you have during this period from January 1, 1945, to August 31, 1946?

A. I think I had about six, five or six.

Q. And were some of those bookkeepers competent or [161] incompetent?

A. I found they were more or less incompetent. That is, during the year 1945 I didn't have any one

(Testimony of Arlie R. Lockwood.)

bookkeeper over a period of three or four months, long enough to discover that he wasn't keeping proper records.

Q. Was it difficult during that period to obtain competent bookkeepers where you were located?

A. Yes.

Mr. Stevens: I object on the ground that it is calling for the conclusion of the witness.

The Referee: Objection sustained.

Q. (By Mr. Cobb): Did you ever blend any foreign substance with gasoline and then sell the gasoline? A. No.

Mr. Cobb: You may cross-examine.

Cross-Examination

By Mr. Stevens:

Q. Mr. Lockwood, with reference to the date, July 31, 1945, which was the occasion upon which Mr. Williams and Mr. Wakefield called upon you and took a physical inventory of your storage tanks, did you not at that time state to Mr. Williams and to Mr. Wakefield that you had blended 792 gallons of kerosene with pressure appliance fuel, just delivered to you on that date, and that you would pay the Motor Vehicle Fuel License Tax on the amount of 792 gallons?

A. I believe I made the statement that I did pump [162] the pressure appliance fuel in the tank that had kerosene in it, and if that constituted a

(Testimony of Arlie R. Lockwood.)

blending or—if that was blending, however you want to call it, then I was willing to pay that.

Q. Did not you make the same statement to Mr. Williams on October——

Mr. Pines: He stated he would pay the tax.

Mr. Stevens: Is there anything in the record here to show the first date we started this hearing?

Mr. Pines: October 17th was the first date on which the objection was set. They weren't heard then, but they were continued from there.

Mr. Stevens: After that date.

Q. (By Mr. Stevens): Did you not state to Mr. Williams on the afternoon of October 21, 1946, that you had blended that 792 gallons of kerosene with the pressure appliance fuel and had sold what you had in the tank as motor vehicle fuel and would pay the Motor Vehicle Fuel License Tax on that quantity? A. I don't think I did, no.

Q. Then would you say you did not make that statement?

A. I don't think I stated that I would pay the tax on that kerosene.

Q. Can you state an instance, a specific instance in which you issued the double invoices on sales to one of your [163] purchasers of motor vehicle fuel?

A. Well, several instances were with Elco Oil Corporation, who are brokers, and who, in turn, sold gasoline to other brokers, and these other brokers would pick it up in their own trucks, and at which time a loading ticket would be made and later billed to Elco Oil Corporation.

(Testimony of Arlie R. Lockwood.)

Q. Can you give me any other instances in which that occurred?

A. Not at the moment, no. I have got to refresh my memory with the records.

Q. Will you do that, please?

A. Shall I go out and get them——

Q. You are here under subpoena.

The Referee: I have got them all out in the back room, if you want to go out there and look them through.

Mr. Stevens: I do want some of them.

The Referee: Take a five-minute recess while he is looking for those records.

(Recess.)

The Referee: The witness now has the documentary evidence.

Q. (By Mr. Stevens): Have you now in your possession the——

A. (Interrupting): There is a couple, yes (indicating).

Q. Were you able to find any other cases of double [164] invoices in your books and records?

A. At this time?

Q. Yes. A. Now, you mean?

Q. Yes. A. No, I didn't go any further.

Mr. Stevens: Well, your Honor, I realize that may take Mr. Lockwood some time. So, at some time I want him to produce every instance he has.

The Referee: I am wondering when we are

(Testimony of Arlie R. Lockwood.)

coming to the end of this case. You say, "some-time."

Mr. Stevens: I will be glad to finish now if Mr. Lockwood will tell us that they are the only instances.

The Referee: If you had given this man any notice that he should produce any such thing—you go in that rear room and look over the mass of records. You ought to give him fair warning. This is so drawn out that I am almost losing my reputation as a sick Job. You know, Job had a reputation for patience.

Do you want to continue for two weeks and give him an opportunity to go through all these records and documents and papers? I will do anything you say, but I would certainly like to come to the end of this case.

Mr. Pines: I would object to any such continuance, because I don't believe it is material before the Court, anyway. [165]

Mr. Stevens: This is the explanation made by this witness.

Mr. Pines: I don't think that the State has established that any gasoline was sold, except possibly some of this blending.

Mr. Stevens: This is cross-examination. I have the right to find out——

The Referee (Interrupting): All right. Let us get to it. Do you want to continue this and give this man a chance to go through those papers?

(No response.)

(Testimony of Arlie R. Lockwood.)

The Referee: Today is the 1st of November. How long will it take to look through the records?

The Witness: I don't know what I can find, your Honor.

The Referee: All right. Continue for a week——

Mr. Pines (Interrupting): Even if the case were that there weren't another one of those instances, I think the objection——

The Referee (Interrupting): He says he has a right to cross-examine, and the man explained that was the way it happened. I am sure he has that right. Do you want to continue a week?

Mr. Stevens: I am ready to go ahead as soon as he can testify on that question.

The Witness: On what question? [166]

The Referee: Give him as much time as he needs. I will continue this matter until next Friday, November 8th, at 10 o'clock. In the meantime you look through those things, Mr. Lockwood, and see what you can find. November 8th at 10 o'clock. That will give you an opportunity, a week.

The Witness: I presume so. It will take at least that long to go through that mess.

The Referee: Dig right into it, and then we can get through. The 8th of November at 10.

(Whereupon an adjournment was taken until Friday, November 8, 1946, at 10 o'clock a.m.) [167]

Wednesday, Nov. 27, 1946. 2:00 P.M.

Mr. Cobb: I just proposed a stipulation, and I think if we can agree on it it will save considerable time, if the stipulation is accepted. I may do it without prejudice to anybody's position. We were just talking about it when your Honor came in.

The Referee: All right.

Mr. Cobb: May it be stipulated, Mr. Stevens, that if a representative of the Bell Oil Company and a representative of the Elm Oil Company were called as witnesses, that they would testify that they were licensed distributors during the period covered by the audit up to May 31, 1946, and that they sold to Mr. Lockwood from time to time gasoline, and the gasoline was picked up at their refinery by Mr. Lockwood's trucks or by a public transportation company, and that Mr. Lockwood was billed for all of the gasoline, and that the billing included taxes of three cents per gallon, and that the bill was paid? And I believe I stated they were a licensed distributor of gasoline during that period of time.

Mr. Stevens: I will so stipulate.

The Referee: All right. You say that is three cents a gallon tax?

Mr. Cobb: That is right, your Honor.

The Referee: The Government is 1½ [168] cents?

Mr. Cobb: That is right.

The Referee: All right. Let's go.

Mr. Stevens: Mr. Lockwood was on the stand.

Mr. Cobb: Mr. Lockwood, will you take the stand, please?

The Referee: Let him be sworn again.

ARLIE R. LOCKWOOD

recalled as a witness on behalf of the Debtor, being first duly sworn, testified further as follows:

Cross-Examination

(Resumed)

By Mr. Stevens:

Q. Mr. Lockwood, during the weeks that have intervened between our last hearing and today, have you gone through your records and found the duplicate invoices to which you referred in your testimony at the last hearing?

A. Yes, I have. I don't know as I found them all, but I found a considerable amount, which I thought would be sufficient.

Q. Do these represent all of the invoices that you were able to find in your records?

A. Yes, sir. I think there were more; however, I couldn't definitely declare that——

The Referee: I still don't hear you. I would like to hear you. I am interested in this.

The Witness: There were probably more, but I was actually unable to find them as duplicates, so I took these. [169]

Q. (By Mr. Stevens): Mr. Lockwood, we took this continuance for the purpose of enabling you to find all of the duplicate invoices that are contained in your records, and I would like you to testify to

(Testimony of Arlie R. Lockwood.)

that fact if it is true. Otherwise, I am going to have to ask you to find all that are in the records.

A. That is an impossibility, because that bunch of books is in such a shape that I haven't been able to tell which are which; and inasmuch as I didn't handle the records, I couldn't definitely tie them up. I am unable to locate the bookkeepers that were taking care of them at that time, and I still couldn't find them all.

Q. But you have gone through the invoices?

A. Yes, I have gone through the invoices, and those are those I picked out, and I know they are definite duplicates.

Mr. Stevens: I would like to offer these in evidence, your Honor. The entire group will be marked as one exhibit, your Honor.

The Referee: I will see what it is. The last number was Claimant's A-4. I presume you want this one A-5?

Mr. Stevens: We are the Claimant.

The Referee: Claimant's No. A-5.

Q. (By Mr. Stevens): As I recall, at our last hearing you testified that you never blended any foreign substance with gasoline? [170]

A. Not intentionally or knowingly.

Q. And with respect to those two tanks, Tanks Nos. 5 and 7 in your bulk plant, in which you had 792 gallons of kerosene, isn't it true that you did blend pressure appliance fuel with that kerosene?

Mr. Cobb: I object on the ground it assumes a

(Testimony of Arlie R. Lockwood.)

fact not in evidence. The testimony was that there were tank bottoms which had water and slush and couldn't be drained off, and that was 790 gallons. Nobody knew what the content——

The Referee: As I recall his testimony, he said it had been kerosene.

The Witness: It had been kerosene; there had been kerosene in the tanks, yes.

The Referee: And it being impossible to get down underneath, then you drained it off for some reason, you dumped gasoline in on top of it, and estimated it was seven hundred and some odd gallons.

Mr. Cobb: And he also testified the water would be in the bottom of the tanks. They didn't know what the contents of the bottom was, it wasn't determined at the time, and——

The Referee: Let him now tell us what he thinks was the fact.

Mr. Cobb: That is what I would like him to do, yes.

The Witness: Was there any question?

Q. (By Mr. Stevens): Would you explain the situation [171] with reference to that 792 gallons of kerosene?

A. I couldn't testify to what was in the bottom of the tanks, but the tanks did have kerosene in them, but I don't know whether anybody pulled samples off the bottom of the tanks to determine whether it was kerosene. After the pressure appliance fuel was pumped in, whether the kerosene was

(Testimony of Arlie R. Lockwood.)

still in the bottom or whether it was blended, I don't know. I couldn't tell you what was on the bottom, but it is my opinion that if the gasoline was pumped in on top of the kerosene, it would probably remain there necessarily without blending.

Q. Are you a petroleum engineer?

A. No, I am not, but——

Q. You are not? A. No, but——

Mr. Stevens: Then, your Honor, I move to strike the statement about his opinion.

The Referee: That is a conclusion.

The Witness: I couldn't testify what was on the bottom of the tanks, or was at that time.

The Referee: I have heard oil and water wouldn't mix, but I haven't heard kerosene and gasoline wouldn't. All right, it may go out.

Q. (By Mr. Stevens): Is it your explanation that you pumped those two tanks as low as you possibly could by suction before you pumped in the pressure appliance fuel? [172]

A. They were pumped until the pump quit pumping, and I assumed that they were down to where they started to suck air, which would probably be the top of the suction line. I don't know exactly where. I think that that pump on those tanks was a centrifugal pump, and immediately when it gets air, it ceases to pump. I couldn't testify as to where the level is in the tank when it quits pumping.

Q. But it is your testimony that you did pump

(Testimony of Arlie R. Lockwood.)

those two tanks that had contained kerosene down to the point where they were drawing air?

A. It was down to the point where the pump ceased to pump any more, and I assumed that they were empty by that fact.

Mr. Stevens: That is all.

The Referee: Anything further?

Redirect Examination

By Mr. Cobb:

Q. Mr. Lockwood, you put in pressure appliance fuel, did you not? A. Yes.

Q. That is not the same as gasoline?

A. It is not exactly the same; it is very similar.

Q. But it is sold for what use?

A. It is sold for, oh, such as Coleman pressure stoves and lanterns, and so forth. I think it is a little lighter fuel than gasoline. [173]

Q. Which is the heavier, kerosene or gasoline?

A. Kerosene.

Q. And when you have a heavier and a lighter petroleum product what results if they are placed in a container?

A. Well, unless they are agitated, they will probably separate and the heavier product will remain on the bottom, or go to the bottom.

Q. Now, was this tank ever aggravated or—what did you call it? A. Agitated?

Q. —agitated after the pressure appliance was put in, the pressure appliance fuel was put on

(Testimony of Arlie R. Lockwood.)

top of the tank bottom? A. Not after, no.

Q. In the course of time, if there is any water in the product stored in the tank, the water settles to the bottom? A. Yes.

Q. And that is what is commonly known as "tank bottom"? A. That is right.

Q. And if there is a further product, wax and petroleum or dirt, what happens to that?

A. Well, it all settles to the bottom. It all has to do with gravity. Petroleum products are different gravities, and of course any foreign matter, such as dirt or water or [174] any number of things that could be picked up by the pump or picked up in the process of transportation—that is the reason we have a bottom on the tank, to eliminate the possibility of the product being contaminated with water. In fact, gasoline tanks have plenty of space in the bottom, and some refineries keep water on the bottom for the protection of a location, because if the tank springs a leak, they lose water and not gasoline. I don't make that a practice, but we do have water in them very frequently, and when it reaches the point it is picked up by the pump, we pump it out so it won't be in the lines and in fuel, and so forth.

Mr. Cobb: That is all.

The Referee: Let me ask you a question. These tanks you have, were they filled from the top or from the bottom?

The Witness: They are filled from the bottom, and they are also pumped out from the bottom.

(Testimony of Arlie R. Lockwood.)

The Referee: Was there no outlet on the bottom of the tank by which you could drain it entirely of its contents?

The Witness: Yes, we have what we call water draws on them that are below the suction. Say this represents a side of the tank, and the outlet, we will say, is here. The bottom of the tank is down here, and as closely to the bottom as possible we have water draws, and occasionally if we don't pump it out, we have to open that valve and drain it out. [175]

The Referee: These tanks you have, was there anything on the bottom or side of them by which you could empty the tank entirely, whatever the content—water or gasoline or kerosene?

The Witness: No, I don't have any bells on those two tanks, so I would have to put a hose down from the top.

The Referee: How high from the bottom of the tank was the inlet which permitted you to fill the tank with fluid?

The Witness: How high from the bottom?

The Referee: Yes.

The Witness: Well, I don't recall that I have ever measured it. I think about five or six inches. I am not sure about that.

Mr. Stevens: We are going to produce some testimony about that, your Honor.

The Referee: Fine. I have never seen those tanks. I was just curious whether you took it out

(Testimony of Arlie R. Lockwood.)

from the top as they do gasoline. I have seen them stick a hose down from the tank top.

The Witness: That is a loading rack. They are filled from the top and pumped out from the same hose.

Mr. Pines: If the Court please, I don't like to see the record cluttered with immaterial matters; and at this time as attorney for the Receiver I would like to move to strike all of the testimony with reference to the blending, [176] on the ground that pressure appliance fuel is not a motor fuel subject to the tax, and in any event this is not pertinent to the issue before the Court.

Mr. Stevens: If the Court please, we are going to show that pressure fuel is a motor vehicle fuel, and is tax paid.

Mr. Pines: Will the Court let the motion be submitted, and after the argument the Court can pass on the motion? I ask that because I think all of this is immaterial.

The Referee: All right.

Mr. Pines: I would like to call the Court's attention that in checking my notes I find that there were Claimant's Exhibits A-5 and A-6 produced at the last hearing, A-5 consisting of the book-keeper's reports in 1946, and A-6 consisting of releases, so that the last exhibit, consisting of the duplicate invoices, should properly be marked A-7.

The Referee: All right, change it to A-7.

(Said duplicate invoices were marked Claimant's Exhibit A-7.)

(Testimony of Arlie R. Lockwood.)

The Referee: Any other questions from this witness?

Recross-Examination

By Mr. Stevens:

Q. Isn't it true, Mr. Lockwood, that pressure appliance fuel is a motor vehicle fuel?

Mr. Cobb: To which we object because it calls for a conclusion of the witness, and it depends on the definition [177] of the statute, and specifications.

Mr. Stevens: He testified as to what it was used for.

The Referee: I think he as a distributor can say what it was sold for, Mr. Cobb.

Mr. Cobb: Yes, he can say what it was sold for, but he asked him as a conclusion whether it was a motor vehicle fuel. They even burn alcohol sometimes for a motor vehicle fuel, but that isn't a gasoline.

The Referee: What did they buy that fuel for?

The Witness: I am handling it at the present time, and it is sold solely for——

The Referee: We are talking about the past. What did you sell it for?

The Witness: We sold it as a pressure appliance fuel. However, I later pumped what was left in the tanks into the gasoline, and incidentally I paid the State tax on that pressure appliance fuel when I bought it.

Q. (By Mr. Stevens): You paid the tax not

(Testimony of Arlie R. Lockwood.)

only on the amount which you pumped into your gasoline tanks, but also on the entire quantity which you purchased; is that not correct?

A. That is right; I paid the State tax on the entire load.

Q. And pressure appliance fuel can be used in automobiles as a motor vehicle fuel, can it not? [178]

Mr. Pines: Just a minute. I object to that as incompetent, irrelevant and immaterial. You can use kerosene, but that doesn't make it gasoline.

The Referee: The question is whether it is a motor fuel, and whether it is taxable.

Mr. Pines: That is a legal question. The witness is not competent to answer that.

Mr. Stevens: It is also a question whether it can be used in automobiles as a fuel.

The Referee: I would like to know. Let him answer the question. What was your answer?

The Witness: It can be used as a motor fuel. So can kerosene, alcohol, or any number of other products.

Q. (By Mr. Stevens): I understood you to refer to a refinery. Do you have a refinery?

A. I didn't refer to my refinery. If I did, it was an error. I didn't mean to refer to it.

Mr. Stevens: That is what I wanted to clear up.

The Referee: There is one question that is still kind of hazy in my mind. What was the purpose of issuing duplicate sales tickets? If you sent out with your driver an original, what was the use of

(Testimony of Arlie R. Lockwood.)

sending out another one? What was the purpose of that?

The Witness: I didn't send them out. If you are referring to those which I just introduced, those are in the form of receipts where another person made a collection and [179] made a receipt at that time for both the customer and our records. I think you will notice particularly on the one you are looking at, he has collected for this particular invoice here for 600 gallons. A receipt was made for 600 gallons of gasoline, \$93, and he has listed the coupons that he picked up at that time. This doesn't necessarily mean that it is an exact duplicate of the gallons that were delivered by the truck, but is a receipt for gallons of gasoline that were delivered previously, and possibly at the time the driver collected this amount of money the station that it was delivered to only had 600 gallons of coupons, so he made a receipt out for 600 gallons and collected that amount of money and coupons, so this is a duplication. It isn't for a delivery of gasoline.

The Referee: What was the purpose of that? Why didn't your driver put all the notations on the original?

The Witness: Because the driver would deliver the gasoline, but he didn't always collect for the gasoline. He would make a bill which he would turn in, saying there were delivered 1000 gallons of gasoline, and maybe another driver would go out and collect maybe the same afternoon, maybe the next day, maybe a week later. In many cases the

(Testimony of Arlie R. Lockwood.)

service stations didn't have the coupons ready, or didn't even have the coupons, and when he went out to collect he would give them a receipt for the gallons and the amount of coupons, and these represent deliveries of gasoline—they [180] are not receipts.

The Referee: Would your drivers deliver gasoline to the stations without picking up the coupons?

The Witness: They have in many cases, yes.

The Referee: Is that according to the rules and regulations?

The Witness: There was always a big argument about that. We made it a common practice to do that, yes.

The Referee: What would happen if Bill Jones never did get the coupons, and you delivered thousands of gallons?

The Witness: I don't know what would happen in that case.

The Referee: You would go down and have to explain to somebody.

The Witness: Well, we did quite a bit of explaining frequently, as far as that is concerned. But I think there was quite an issue made of that fact. All gasoline companies resented the fact that they had to have their drivers wait until the stations got coupons ready, and so forth. That was quite a sore spot.

The Referee: Wasn't it a part of the rules and regulations you were not to deliver gasoline without coupons?

(Testimony of Arlie R. Lockwood.)

The Witness: I couldn't say what the regulations were. I know we all made a practice of delivering gasoline without coupons and collecting them later.

The Referee: You were more generous than they were [181] with me. They would ask me to see my coupons before they would start with the hose.

Mr. Cobb: I think he couldn't collect coupons before he delivered. They couldn't until they collected from the service station. His collection should balance the amount of gasoline that was delivered, and he passed them in on back down the channel until they reached the party that had to finally account.

The Witness: To give you an example, I bought hundreds of thousands of gallons from Bell Oil & Refining Company. My account was on an open account basis, and generally at the end of the month, and two or three times a month, I would send them a check for money I owed them, and at the same time I would send them a check for the coupons I owed them, and it would sometimes run into hundreds of thousands of gallons. I might have received a hundred thousand gallons of gasoline, but no coupons changed hands until I wrote a check for the coupons also.

The Referee: Any other questions of this witness?

Q. (By Mr. Stevens: These two tanks, Nos. 5 and 7, in which you had the kerosene——

A. 6 and 7.

(Testimony of Arlie R. Lockwood.)

Q. ———were both filled and pumped out with the same pipe, were they not?

A. No, I think that each had a separate pipe to the pump. At this time they are connected together, but at that [182] time they were separate, I am quite sure.

Q. You didn't load the tanks then and unload them through the same pipe?

A. No, I don't think so.

Mr. Stevens: That is all.

Mr. Cobb: That is all.

(Witness excused.)

The Referee: Next witness.

LLOYD DYER

called as a witness on behalf of the Debtor, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cobb:

Q. Will you state your name, please?

A. Lloyd Dyer.

Q. Where were you employed during the calendar years 1945 and 1946?

A. 1945 I was employed by Dependable Oil Company, and in 1946 I don't remember just exactly when I went into business for myself.

Q. And when you say Dependable Oil Company, that is Mr. Lockwood? A. Mr. Lockwood.

(Testimony of Lloyd Dyer.)

Q. Doing business as Dependable Oil Company?

A. Yes, sir.

Q. During the time you were employed by Mr. Lockwood, [183] what were your duties?

A. I drove a truck, a lubricating oil truck delivering oil, gasoline and cleaning solvent to service stations.

Q. Did you do any collecting? A. Yes, sir.

Q. And will you state in your own words what your procedure and practice was during the time that rationing was on with respect to stamps in collecting and making out of receipts?

A. Well, there were some customers that Mr. Lockwood sold gasoline to that he also sold oil to. These customers Mr. Lockwood would send his gas truck out there, and when I would go into the plant and was loading my truck up, he would say, "If you go by Santee Service today, see if you can collect that money from him. He owes us for gasoline." I would go down there, the gasoline would already be delivered, and I would ask him for the money. He would say, "Well, I haven't got the stamps ready. I have got seven or eight hundred gallons and you can take this and the money for this, and we will keep a record of this." So those duplicate bills with my name on them would be destroyed after I came into the plant and a record was made of them, because they are nothing but receipts where I collected the money for so many gallons of gas.

Q. You turned those in to the bookkeeper?

(Testimony of Lloyd Dyer.)

A. Yes. As I turned the money in for my sales on [184] the oil, I also turned those in.

Q. And when the gasoline was delivered, the truck that delivered it would also leave a delivery slip?

A. Yes, sir; that is true.

Q. Will you examine the documents there marked Claimant's Exhibit 7 and see whether there are any of those documents that you made out?

The Referee: What is this witness' name, Smith?

The Witness: Dyer. This one is not mine. The others up to this are mine.

Q. (By Mr. Cobb): 1700 made out on 1/8/45, that isn't yours?

A. No, sir.

Q. Go ahead. Up to that point all of them are yours?

A. No. These are not mine. This is mine.

Q. Well, the first one I have identified, that was yours, and then down to January 12, 1945, one marked paid, representing 457 gallons of Ethyl, that is yours?

A. Yes, sir.

Q. But the ones in between are not yours?

A. No, sir; these are not mine. This is not mine.

Q. That is the one of 6/5/45 for 2900 gallons of Ethyl, to Ward Bloom or Mark Bloom?

A. Yes, sir.

Q. That is not yours?

A. No, sir, that is not mine. [185]

Q. The others following that are yours?

A. No, these are not mine here.

Q. 12/29?

A. No, sir, that is not mine.

(Testimony of Lloyd Dyer.)

Q. You are referring to 590 Tetra Ethyl?

A. Yes, sir.

Q. To Harry? A. Yes.

Q. Now, you would not make a receipt out for more than they had stamps for?

A. No, sir; I wouldn't do it. If they had the stamps there I would list the stamps and take what stamps they had, and what money—it would represent the amount of gallons they had in stamps, and I would take the stamps in.

Q. If they owed more money, you would just let them owe it?

A. I would just let them owe it. I just collected what I could get out of them, that is all.

Mr. Cobb: You may cross-examine.

Mr. Stevens: No questions.

The Referee: You may stand aside, sir.

(Witness excused.)

The Referee: Anything further?

Mr. Cobb: I think that is all we have, your Honor.

Mr. Stevens: I would like to call Mr. Lyles to the stand again. [186]

VIRGIL M. LYLES

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Mr. Lyles, I am handing you the group of invoices which are marked Claimant's Exhibit A-7. I am going to ask you to go through those invoices and separate those which you included as sales in your audit.

A. This is going to take a little time.

Mr. Stevens: Perhaps we could save some time by putting on another one of my witnesses while Mr. Lyles goes through these.

The Referee: All right.

(Witness withdrawn.)

Mr. Stevens: I will call Mr. Wakefield to the stand.

CLARENCE M. WAKEFIELD

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. You are C. M. Wakefield?

A. Yes, sir.

Mr. Stevens: Mr. Wakefield has testified previously. [187]

(Testimony of Clarence M. Wakefield.)

Q. (By Mr. Stevens): Mr. Wakefield, did you measure the distance from the bottom of tanks 5 and 7 on Mr. Lockwood's premises, his bulk plant premises, to the pumping outlet? A. I did.

Q. Would you state what those measurements are with respect to each tank?

A. No. 5 was $6\frac{1}{2}$ inches from the bottom of the tank or bottom of the pipe to the bottom of the tank, which included the bottom plate of the tank, which would probably be about six inches.

The Referee: Am I to understand that the pipe that let the fluid run into the tank was approximately six inches above the level of the bottom of the tank?

The Witness: That is right. That was also the fill pipe and the unloading pipe. There was only one pipe. When they loaded the tank the fluid went through that pipe; when they unloaded, it also went out the same pipe.

Q. (By Mr. Stevens): Was there any valve at the bottom of the tank by which it could have been emptied?

A. On 5, I don't believe so. 6 and 7 had a pet cock at the bottom.

Q. What was the distance between those two points in tank 7?

A. $11\frac{1}{2}$ inches.

The Referee: How much?

The Witness: $11\frac{1}{2}$ inches, which left there really about [188] an inch of fluid that would be in the bottom above the drain pipe.

(Testimony of Clarence M. Wakefield.)

Mr. Stevens: That is all.

The Referee: Any questions, Mr. Cobb?

Cross-Examination

By Mr. Cobb:

Q. You don't know how low the liquid would be lowered by the application of a suction pump to the fluid in tank No. 5?

A. Yes, it would be probably six inches, the fluid in the bottom, after the suction, up to the suction.

Q. And do you think there would be an inch in the other tank? A. Yes, sir.

Q. Now, the only way you could get that out would be to bring somebody with special equipment out there to clean the tank out, this particular tank 5?

A. You mean if you wanted to recover the bottom part of it? Sometimes they put water in and force up the fluid that they want to recover up to the suction line, and recover the stuff above. Other than that, they would take a hose and drop it over and pump it out.

Mr. Cobb: That is all.

The Referee: Let me ask you a question. It may be silly—but if you put water in gasoline, do they mix?

A. No, they do not mix. In taking inventories— [189] I have taken hundreds of inventories at refineries—we use different pastes to determine the amount of water, which we did in this case.

(Testimony of Clarence M. Wakefield.)

And in taking the inventory, is the bottom of the plumb bob we put this paste. The paste as soon as it enters the water turns a different color from the gasoline, and therefore we can determine to the eighth of an inch how much water there is there.

The Referee: Then if you had say six inches of water in the bottom of this tank and put gasoline on top of it, am I safe in saying the gasoline would stay on top of that water?

The Witness: Within a half hour, yes.

The Referee: What happens during the half hour?

The Witness: If it was dumped in from the top, there would be a certain amount of water come up, which would immediately settle. It would take a little while for it to settle. It would agitate it to the extent there would be some water above, and it would take a few minutes for that to settle.

The Referee: All right.

(Witness excused.)

Mr. Stevens: I would like to recall Mr. Williams.

HAROLD S. WILLIAMS

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows: [190]

Direct Examination

By Mr. Stevens:

Q. Mr. Williams, do you hold a degree from any college or university?

(Testimony of Harold S. Williams.)

A. Yes, University of California.

Q. And in what school was your degree obtained?

A. Mining and Petroleum Engineering.

Q. Since graduation have you been engaged in petroleum engineering?

A. Shortly after graduation I left the mining—I did start in the mining industry, and switched to the petroleum industry in 1921. I have been actively identified and connected with it, both in refining and in marketing, since 1921.

Q. Is it possible for kerosene to be blended with gasoline or other motor vehicle fuel?

Mr. Cobb: To which we object on the ground it calls for a conclusion of the witness, and it is immaterial and irrelevant as to whether it is possible to mix it. I think we can all stipulate that water and anything else can be mixed for a certain period of time.

The Referee: Well, the gentleman has had some 24 years' experience after graduation, as an expert. I think he should be qualified to tell us. The objection will be overruled.

The Witness: Yes. Motor vehicle fuel or gasoline [191] and kerosene will, when blended, mix and commingle into a homogenous liquid.

Q. (By Mr. Stevens): Now, let's get down to the specific facts of these tanks 5 and 7 in Lockwood's bulk plant.

A. Yes, sir.

Q. On the date that you and Mr. Wakefield took your physical inventory, March 31, 1945.

(Testimony of Harold S. Williams.)

A. I have the original copy signed by Mr. Lockwood.

Q. You have heard Mr. Wakefield's testimony to the effect that with respect to tank No. 5 there was 61½ inches from the bottom of the tank to the bottom of the outlet? A. Yes, I did.

Q. Can you tell us how many gallons of liquid could be contained in that tank?

A. May I make an explanation? Tank 5—Mr. Wakefield got his numbers reversed. Tank 5, the outlet is an inch and a half off the bottom, and tank 7, 61½ inches. The figures that I have, and according to the figures that were taken in tank 5, with an inch and a half off the bottom, there would be, with the calibrations of that tank, 60 gallons in the bottom of that tank up to the outlet pipe. The capacity of that tank was 3.96 gallons per inch, and there was no water in the tanks at the time we took the inventory, because we gauged, Mr. Wakefield and myself, in company with Mr. Lockwood, to the water gauges on each tank [192] in the plant, and we found water in tank No. 2, the gasoline tank, 11¼ inches. The method was as explained by Mr. Wakefield, water paste at the bottom of the tape and bob. There was no water in tank 2 at the time of our inventory, upon the day the pressure appliance fuel and kerosene inventory took place.

Q. And tell me what the——

A. Pardon me. The calibrations was 221½ inches, and then 61½ off the bottom—I didn't multiply it,

(Testimony of Harold S. Williams.)

but it would be six times $22\frac{1}{2}$, about 135 gallons in the bottom of that tank. The total of the two tank bottoms to the suction line was about 195 gallons.

Q. Now, from your experience as a petroleum engineer, will you give us your opinion as to what will happen when pressure appliance fuel is pumped into tanks containing kerosene above the level of the intake pipe?

A. Pumping into a tank directly into a liquid, pumping gasoline into a liquid would create sufficient turbulence in those bottoms, as they are called, tank bottoms—we must judge there was in either tank at least 200 or 400 gallons or more in each tank bottom above the suction line. The pumping in of that motor vehicle fuel into the kerosene would create sufficient turbulence that the gasoline would blend with the largest proportion of the kerosene that was in the bottom of the storage tank, and make rather a homogenous liquid. As we know, a blend of gasoline, half [193] gasoline and half kerosene is ruled as taxable motor vehicle fuel.

Mr. Pines: I move to strike the answer of the witness on the ground it is not responsive to the question. The hypothetical question which was put to him dealt with the commingling of pressure appliance fuel and gasoline, and the answer dealt with commingling of gasoline and kerosene.

The Referee: The motion will be denied. It is quite illuminating.

The Witness: Gasoline or pressure appliance fuel has been, or was in most instances——

(Testimony of Harold S. Williams.)

Mr. Pines: Just a minute. I object to any voluntary statement.

Mr. Stevens: I will ask him the question.

Q. (By Mr. Stevens): Will you state what pressure appliance fuel is?

Mr. Pines: Just a minute. I object to that on the ground no proper foundation has been laid. The witness doesn't know whether it is for tax purposes or whether it is for——

The Referee: Well, let's find out.

Mr. Pines: I think the question ought to specify, so we will know what he is talking about. We may get a conclusion into this record which may have no bearing on the issues.

Mr. Stevens: I will ask the question in order to [194] meet Mr. Pines' objection.

Q. (By Mr. Stevens): What types of fuels are motor vehicle fuels as determined with respect to the Motor Vehicle Fuel License Tax Law?

Mr. Pines: I object to that as calling for a conclusion of this witness, a conclusion of law by this witness, and there is no proper foundation laid for his testifying as to such questions.

The Referee: The objection will be overruled. Here is a man who has been working for years in this line, and he must have read it and must know the rules.

Mr. Pines: The best evidence would be the law.

The Referee: That is true, but I am not going to be that technical. Here is a man that has been for years and years with this problem, and you

(Testimony of Harold S. Williams.)

want to say he doesn't know what rules he is working under. I am looking for the truth. The objection will be overruled.

Mr. Pines: I wouldn't have made any objection if he had been asked to state the rules. He was asked to state his personal conclusion.

The Referee: He is telling you what he has read and known for many years.

Mr. Stevens: I will read into the record——

The Referee: Show it to Mr. Pines.

Mr. Pines: I know the rule, your Honor. He might read from something you might [195] question.

The Referee: I am familiar with it. That is the law. I don't think it is proper for this man to give his personal opinion.

Mr. Stevens: Section 7308 of the Taxation Code of the State of California reads as follows:

“ ‘Broker’ includes every person, other than a distributor, dealing, either as the owner or as the agent of another, in motor vehicle fuel, kerosene distillate, kerosene, Diesel fuel, gas oil, stove oil, distillate or any other petroleum product used in, or which may be used, in blending, compounding, or manufacturing of motor vehicle fuel.”

Mr. Pines: It is stipulated, your Honor, that the law so provides.

The Referee: All right; there is your answer.

Mr. Stevens: Perhaps, Mr. Reporter, it would be best if you could read the last question which I put to Mr. Williams.

(Record read.)

(Testimony of Harold S. Williams.)

Mr. Stevens: Will counsel also stipulate that Section 7304 of the Motor Vehicle Tax Act provides:

“Motor vehicle fuel includes gasoline, natural gasoline, and any inflammable liquid, by whatever name the liquid may be known or sold, which is used or is usable for propelling motor vehicles operated by the explosion type of engine.” [196]

It does not include kerosene.

Mr. Stevens: I will so stipulate if counsel will also stipulate that in the case of *People vs. Sterling Refining Company*, 86 Cal. App. 558, the Court held that gasoline which is one-half kerosene constitutes an inflammable liquid, and if sold to operate motor vehicles on public highways is subject to the tax.

Mr. Pines: I am not required to stipulate.

Mr. Stevens: You are offering the stipulation.

Mr. Pines: May I be heard?

The Referee: The stipulation is out. Let's get on to something else.

Mr. Pines: No one stipulates to the holding of a case if he can produce it. I haven't read the case. I would be glad to stipulate if it so held, which I doubt.

The Referee: Let's get on.

Mr. Pines: The purpose of the use that the law itself sets forth is the criterion.

Will you read the last question again, Mr. Reporter?

(The record was read.)

The Referee: That was answered by your reading from the Tax Act, wasn't it?

(Testimony of Harold S. Williams.)

Mr. Pines: That is right, the Motor Vehicle Fuel License Tax.

Q. (By Mr. Stevens): Is pressure appliance fuel a liquid which is used or is usable for propelling motor [197] vehicles operated by an explosion type of engine?

A. It is usable and was used considerably during gasoline rationing, because pressure appliance fuel, while subject to the three cents a gallon motor vehicle fuel tax, was not rationed by the OPA. In fact, most pressure appliance fuel was straight water-white gasoline, and met fully gasoline specifications.

Q. And the distributors of motor vehicle fuel pay the motor vehicle license tax upon their distribution of pressure appliance fuel?

A. Right; they do.

Mr. Stevens: That is all.

Cross-Examination

By Mr. Cobb:

Q. And after they pay it, they can get it back if they file an application to show it is used for appliance purposes?

A. If they make an affidavit that they have used it for other purposes than a motor vehicle fuel.

Q. Now——

A. They can do that with gasoline, too.

Q. In your computation on these tank bottoms, you computed the tank as being 6½ there for the inventory, did you not?

A. That is right.

(Testimony of Harold S. Williams.)

Q. You heard Mr. Wakefield testify that he allowed a [198] half an inch by reason of the tank plate?

A. The way I took Mr. Wakefield's testimony was that he didn't allow 6½. He allowed 6½ from the bottom of the tank, and there would be only 6 inches of liquid in the tank, which would reduce those gallons an additional small amount. These tanks are not large tanks, and the capacity per inch is not very large.

Q. You made no test when you were there and were told that that had been done on that particular day, you made no test to see what the specifications of the contents of the tanks were, did you?

A. We normally don't do that when we are taking gauges.

Q. You didn't do it?

A. No. We asked Mr. Lockwood what was in the storage tanks.

Q. And this tape you run down to measure that has the color indicator on it, you have to allow for some discrepancy in that, don't you?

A. No. You have a bob at the end, but if it measures on the bob, you bend your tape back and measure the actual number of inches and read on the bob, which is on the bottom.

Q. The bob that is on the bottom doesn't have this chemical that registers water, does it?

A. Right to the very bottom of it, yes, right to the [199] very tip.

Q. Why does Mr. Wakefield make an allowance

(Testimony of Harold S. Williams.)

of a portion of an inch for the inability of the tape to register the amount of water?

A. He didn't make such a statement as that. He wouldn't, because we take a bob—if you have ever seen a surveyor's tape, the bob is carried separately so it doesn't break the tape. We hang that on the bottom. It is a completely calibrated tape, right at the very bottom of the bob. We drop it to the bottom of the tank. We have water paste on it from the very tip right up the side.

Q. If the tank is unlevel, your reading on that tape would be deeper on one side and shallower on the other, wouldn't it?

A. It is possible. It would have to be very badly tipped to be very much out of kilter, however, Mr. Cobb.

Q. Well, depending on the degree that is off level, it would depend upon the degree of the depth below this drainage, wouldn't it?

A. No. We drop right to the bottom of the tank. If the tank is a little off tilt, we would certainly notice any great tilt and try and take that into computation.

Q. You didn't have a level and make any effort to determine whether this was level or not?

A. In fact, we walked completely around the tank, because in making the calibrations we had to observe the [200] circumference of the tank.

Q. You have seen tanks cleaned out, and you have never seen one where it wasn't at one end

(Testimony of Harold S. Williams.)

there was a certain amount of liquid, and on the other it was dry?

A. Yes, but when that is measured it would be three or four gallons.

Q. You can't tell by looking at a tank whether it is one or two inches off level or not?

A. If it is one or two inches off, it would only make a difference of 4.0 gallons.

Mr. Cobb: Read the question.

(Question read.)

A. I think you could tell, because the tank would probably be tilted. That is a vertical tank.

Q. (By Mr. Cobb): You mean to say you can tell or can't you?

A. I won't say I can tell exactly to the inch or two inches.

Mr. Cobb: That is all.

The Referee: Any other questions?

Mr. Stevens: No.

(Witness excused.)

Mr. Stevens: Mr. Reavis. [201]

H. CLAY REAVIS

called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stevens:

Q. State your name, please.

A. H. Clay Reavis.

(Testimony of H. Clay Reavis.)

Q. By whom are you employed?

A. By the State Board of Equalization, State of California.

Q. And what is your position?

A. Auditor, Grade 3, in charge of the outside auditors of the Motor Vehicle Fuel Tax Department.

Q. What are your duties in that division?

A. Reviewing and assigning of audits from the Southern Division of the Motor Vehicle Fuel Tax Department.

Q. As a part of your duties in reviewing, do you make recommendations that additional assessments be made in the event the audits justify that?

A. I do.

Q. Did you in the month of March or April, 1946, receive a request from Bell Oil Company for the Commission to surrender its license as a refiner and distributor?

Mr. Pines: I object to that as being incompetent, irrelevant and immaterial.

The Referee: I don't know what the purpose of it is. [202] Objection overruled.

The Witness: The request would go to Sacramento for cancellation of distributor's license, and that was received in Sacramento sometime about the 1st of April.

Q. (By Mr. Stevens): What did you receive?

A. We received a notice of the request for cancellation and a final audit being set up then for the Bell Oil & Refining Company.

(Testimony of H. Clay Reavis.)

Q. Did you assign an auditor to go out and make a close-out audit of Bell Oil & Refining Company?

A. I did.

The Referee: Where was the Bell Oil located?

The Witness: The Bell Oil & Refining plant, the refinery itself is located at Santa Maria. Their head offices, where all the records are available, were here in Los Angeles at 1020 Pacific Finance Building, Los Angeles, California.

Q. (By Mr. Stevens): Have you in your possession the close-out audit for Bell Oil & Refining Company? A. I have.

Q. Does that audit disclose that any sales were made by Bell Oil & Refining Company after March 31, 1946.

A. Our audit discloses as of March 31, 1946, all motor vehicle fuel, either raw or finished, was turned over and invoiced to the Sun Ray Oil Company at the time they took over under a new distributor's license as of April 1st.

The Referee: 1946? [203]

The Witness: 1946, April 1st.

Q. (By Mr. Stevens): And have you received any further report from Bell Oil Company to show that any additional sales were made after March 31, 1946, by it to any other person?

A. No, sir.

Mr. Stevens: Cross-examine.

(Testimony of H. Clay Reavis.)

Cross-Examination

By Mr. Cobb:

Q. Sun Ray continued to operate the business formerly conducted by the Bell Oil Company?

A. That is right, Sun Ray Bell Oil Corporation.

Mr. Cobb: That is all.

(Witness excused.)

The Referee: We will take a short recess at this time.

(Recess.)

Mr. Stevens: I will call Mr. Lyles back to the stand.

VIRGIL M. LYLES

recalled as a witness on behalf of the Claimant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Stevens:

Q. Have you completed your examination of the invoices contained in Claimant's Exhibit A-7? [204]

A. Yes, I have.

Q. Now, will you state—I am going to try to make it easy for myself, and just ask you to state your findings with respect to those invoices.

A. Well, I find that there are invoices representing 49,465 gallons which appear on the face of them to be sales invoices. They are entered in Mr. Lockwood's sales record, and from there of course in-

(Testimony of Virgil M. Lyles.)

cluded in his broker's report, and are also in our audit. I see no reason from what I have here to say that they are duplicates.

Q. Is that true of all of the invoices?

Mr. Pines: Just a moment. I move to strike the testimony of the witness as to what he doesn't see any reason to include, as a conclusion.

The Referee: All right.

Q. (By Mr. Stevens): Is that true of all of the invoices that are a part of Claimant's Exhibit A-7?

A. That is not true of all of them. I also have invoices totaling 33,480 gallons, which are paired invoices—that is, there are two invoices in each case.

Q. Will you state which ones those are?

A. Well, first I will say there are two invoices which appear to represent the same sale in each instance. There is on June 6th an invoice to Elco Oil Corporation, No. 1194, for 2,900 gallons, and an invoice to Warren Service, No. 1613, for 2,900 gallons. We have in the audit [205] the invoice to Elco for 2,900 gallons. We don't have the invoice to Warren Service.

There are two invoices dated December 5th, which are merely an invoice and its duplicate, or rather carbon copy, to Dependable Service, No. 2497. We have that in our audit as a single item; that is, the gallonage is 450 gallons. We have 450 gallons, we do not have 900. We do not have it twice.

On July 11th there are two invoices to Elco Oil Corporation, No. 1938 and No. 1939. No. 1938 is

(Testimony of Virgil M. Lyles.)

marked a duplicate, and we do not have it in our audit. We do have No. 1939.

Under date of June 5th there is an invoice to Mark Bloom, No. 1611, 2,900 gallons. On the same day there is an invoice to Elco Oil Corporation, No. 1191, for 2,900 gallons. We have the invoice to Elco Oil Corporation. We do not have the invoice marked "Bloom."

On June 2nd there is an invoice to Mark Bloom, No. 1603, for 2,900 gallons. On the same date an invoice to Elco Oil Corporation, No. 4166, for 2,900 gallons. We have the invoice to Elco Oil Corporation. We do not have the invoice to Mark Bloom in our audit.

On December 29th there is an invoice and its carbon copy to Harry, No. 0436, for 590 gallons. We have the invoice once—that is, 590 gallons. We do not have both the original and the copy in our audit. [206]

Q. Do you find any invoice which is not reported either in the books, the sales book of Mr. Lockwood, or your audit?

A. On March 16th I find an invoice to Al Smith, No. 1414, for 814 gallons. I do not have it in the audit, nor is it in the sales book that I can find.

Q. In other words, from your examination of the invoices included in Claimant's Exhibit No. A-7, you have found no invoice which constitutes a duplication of any invoice which you have included in your audit?

A. I find no invoice that I would say is a dupli-

(Testimony of Virgil M. Lyles.)

cation. That is, that has been entered in my audit and results in a duplication of sales in the audit.

Q. I see that you have made a pencil list of these invoice numbers, and also have noted beside each invoice number the date of the sale and the name of the vendee. Now, referring to Elco Oil Corporation, the sale on May 22, 1945, invoice No. 1168 for 1,400 gallons, have you anything in your records and working sheets to show a cross check between that figure and the records of Elco Oil Corporation?

A. We have an audit of Elco Oil Corporation showing the receipt of the gasoline in that invoice.

Mr. Stevens: I think that is all that I have to ask of this witness. [207]

Cross-Examination

By Mr. Cobb:

Q. In other words, you do find that these invoices marked here as No. A-7 are duplicates of gasoline that is delivered or had been delivered by delivery receipts at a previous date?

A. No, I don't.

Q. Well, is that because you are unable to tie these particular invoices into some other delivery slip?

A. Well, it is because the only thing that I have here is what appears to be a regular sales invoice, and it is entered on Mr. Lockwood's sales books as such.

Q. All right. Now, you went to his desk and found a stack of delivery slips, as I understand it,

(Testimony of Virgil M. Lyles.)

showing that some transportation company delivered tanks of gasoline to different buyers; is that not right?

A. To a buyer, yes.

Q. And in making your audit you took the amount of gasoline represented by these delivery slips and charged Mr. Lockwood with having delivered that much gasoline; is that right?

A. That is right.

Q. Now then, these delivery slips here, or receipts, when they were turned into the bookkeeping department he posted the \$93 and the amount of gasoline that was represented in the books as having been sold to this particular station, [208] say Al Smith's station; is that right?

A. It is posted in his sales book.

Q. And then you took the amount of gasoline that is posted in his sales book, to wit, the 600 gallons sold to Al Smith, and charged Mr. Lockwood with that gasoline, didn't you?

A. That is true.

Mr. Cobb: That is all.

The Referee: Is that all for this witness?

Mr. Stevens: No, I have another question now.

Redirect Examination

By Mr. Stevens:

Q. Were any of these sales evidenced by the invoices contained in or included in Claimant's Exhibit No. A-7 duplicates of the invoices which you found in the drawer of Mr. Lockwood?

(Testimony of Virgil M. Lyles.)

Mr. Cobb: We object on the ground that calls for a conclusion. He testified what he did. He took the delivery slips of gasoline in this desk drawer and then he charges Mr. Lockwood with that. He takes these invoices represented here, and he charges him with that. Now, the fact that he is not convinced somebody hasn't shown him that the amount of gasoline represented by these are the same as those in the other, why, he says he doesn't recognize it as a duplicate, but that is his conclusion.

The Referee: That is a matter for [309] argument.

Mr. Stevens: Will you read the question?

(Question read.)

The Referee: He has already told us here that these seem to be merely certificates of cash sales. He has already answered already. Isn't that right, Mr. Witness?

The Witness: That is right; and they are not duplicates of the sales which I set up from transportation tickets.

Q. (By Mr. Stevens): As a matter of fact, are they to the same customer as shown by these invoices? A. No.

Q. As the transportation tickets?

A. The customer does not appear in this group of invoices at all.

Mr. Stevens: That is all.

Mr. Cobb: Just a minute. I am sure I don't understand that, the way he comes back again.

(Testimony of Virgil M. Lyles.)

Recross-Examination

By Mr. Cobb:

Q. You went out there and you found that the transportation companies had made out delivery slips of gasoline to stations, didn't you?

A. It appears to me that you are speaking of the six loads of gasoline which I set up as sales to Scotty's Service Stations.

Q. Well, I am talking about your general practice. They have a stack of delivery slips that you used, as I [210] understand, in making your audit?

A. Well, these same slips right here, with the exception of the six to Scotty's Service Stations.

Q. Well, I don't want to confuse you, but you have me confused. Let's try to have an understanding.

In Mr. Lockwood's records there were delivery slips taken by the drivers for gasoline delivered to different customers; is that the way——

A. If they were delivery slips, they were made out on these same forms right here, and bear at least all the earmarks of invoices on the face of them.

Q. Will you listen to the question?

In connection with Mr. Lockwood's operations, his truck drivers would deliver gasoline and would turn in a receipt for the delivery of gasoline; is that right? I am speaking generally. Just forget about this here. Tell us generally if that was the practice they used.

(Testimony of Virgil M. Lyles.)

A. I don't know what his truck drivers turned in.

Q. Well, did you find in the records that you made an audit of delivery slips showing that a certain truck and driver delivered gasoline to a particular station on a particular date?

A. If you are speaking of Mr. Lockwood's own slips, these forms right here—yes, I did.

Q. And you took all of the receipts that showed those deliveries and charged them to Mr. Lockwood as having [211] sold the amount of gasoline evidenced by those delivery slips for the particular month?

A. Except as to those which I believed at the time were duplicates.

Q. Yes. Well, with that qualification, that was what you used; is that right?

A. That is right.

Q. Then you went to the sales book and there you found posted sales to different individuals which are covered by the invoices that constitute Exhibit 7; is that right?

A. That is right.

Q. Then you don't have any knowledge or don't know whether the gasoline that was represented by these delivery slips that were turned in by the truck drivers to a particular station were the same gasoline as covered by these invoices that are receipted as having been paid and which were posted in the books as being paid? You wouldn't know whether—take for example this one on June 25, 1945—somebody collected for 600 gallons of Ethyl gasoline, \$93; is that right?

(Testimony of Virgil M. Lyles.)

A. I don't know whether that is right or whether he sold 600 gallons. Apparently someone collected, because the invoice is marked "Paid."

Q. All right. This is the top one on Exhibit 7, and that was posted to the books on that day of \$93 for 600 gallons of Ethyl gasoline sold to Al Smith; is that right? [212]

A. That is right.

Q. Now, you took and charged 600 gallons to Mr. Lockwood as being sold on that date to Al Smith?

A. Yes.

Q. Now then, a week prior to that there was a delivery slip to Al Smith of 1200 gallons of gasoline, and the delivery slip was there in Mr. Lockwood's records, and you charged him with the deliveries that occurred a week before that of this large delivery; isn't that right?

A. That is right. And his bookkeeper apparently did the same thing during the months represented by those invoices.

Q. Well, that is my point.

No further questions.

The Referee: Any further testimony here?

Redirect Examination

By Mr. Stevens:

Q. Would you explain this last statement of yours——

The Referee: Listen, gentlemen. I thought you were ready for argument. I am going to put this over. I am not going to have you go over and over the same stuff. I will continue it for you, but I am not going to sit here until half past four. How long

(Testimony of Virgil M. Lyles.)

do you think you want to argue this matter? I don't want much argument.

(Discussion off the record.)

The Referee: What is the question you want to put now? [213]

Mr. Stevens: I don't understand this last statement.

Q. (By Mr. Stevens): Is your testimony that you have included the same sale twice in your audit?

Mr. Cobb: That is a different question, and calls for a conclusion, your Honor.

The Referee: There you go now in another long argument. All right, what is your answer, Mr. Witness?

The Witness: My answer is that I did not include these items twice on my audit.

Mr. Pines: I move to strike that on the ground it is a conclusion of the witness. He has already testified to what he did. The Court will decide. He has already testified what he did.

The Referee: It seems to me you get farther and farther away from the true facts.

Mr. Pines: The Court can determine whether or not——

The Referee: I am prepared right now to determine it. I don't want much argument on it, either. I have pretty well made up my mind as to what this is all about.

Well, do you want to talk to me five minutes

apiece, or do you want me to come back here next week and hear you at length?

(Discussion off the record.)

Mr. Cobb: It has been stipulated I might offer this letter next in order, your Honor.

Mr. Stevens: I stipulate it is a correct copy. I assume it is immaterial, however.

The Referee: I don't know what the number is. Apparently the last Debtor's Exhibit was A-3. A-4 for the Debtor.

(Said letter was marked Debtor's Exhibit A-4.)

The Referee: I will hear you very briefly.

Mr. Stevens: Section 7306 of the Revenue and Taxation Code of the State of California defines a distributor as every person who within the meaning of the term distributes as defined in this chapter, distributes motor vehicle fuel, and also includes every person who refines, manufactures, produces, blends or compounds motor vehicle fuel in this State, and every person who imports motor vehicle fuel into this State, or who received in this State motor vehicle fuel of which there has been no prior taxable distribution.

So far as the evidence is concerned, I think it establishes with respect to at least the 792 gallons of kerosene that Mr. Lockwood did blend that, and thus made motor vehicle fuel, and thus is a distributor within the meaning of the Act.

It has also been testified by Mr. Lockwood that he is not licensed as a distributor.

Article IV, Sections 7726 to 7732 of the Revenue and Taxation Code cover unlicensed distributors, and set forth the penalty which shall be imposed upon one who distributes gasoline that isn't tax paid first, fixing the penalty at [215] 100 per cent.

Now, getting back to the actual audit itself, I think it establishes that Mr. Lockwood has made a great number of sales in excess of what his records show that he had received. In that connection I would like to point out that Mr. Lockwood has been given every opportunity, not only by the staff of the State Board of Equalization, but also by the Court in this proceeding, to explain the difference between the total sales, as shown by his books, and his total purchases, as shown by his books, and that he has failed to give any satisfactory explanation of that difference. I would therefore like to rely upon the well-accepted rule that there is a presumption that if evidence is not produced by a litigant which he can produce which would refute evidence showing liability, that such evidence is adverse and would support his adversary.

The Referee: That is a time-honored rule. I read that about 40 years ago, I think. I don't think they have changed it since.

Mr. Stevens: In this case the only person who has any knowlege of where the gasoline was obtained which was sold by Mr. Lockwood and not shown by his records is Mr. Lockwood. He has failed to produce that testimony. Therefore, applying this presumption, it should be presumed that the evidence, if it were produced, would disclose

that it was gasoline which was not tax paid, and therefore Mr. [216] Lockwood has sold gasoline which was not tax paid, and is a distributor, an unlicensed distributor within the meaning of the Act.

In our testimony we have shown that there were possible sources of obtaining tax free gasoline during the period of this audit. We have shown a reason why a distributor of gasoline would not disclose gasoline which was furnished to Black Market operators, because of the fact that he is required to file with the State Board of Equalization, along with his motor vehicle fuel distributor's return a duplicate return for the purpose of passing it on to the OPA after the Board has compared the two. In other words, it would not be practicable for a distributor to pay tax on more gasoline than he actually has coupons to cover, because he gives his duplicate copies to the State Board of Equalization, and he has to have enough coupons to cover the amount of gasoline which he reports to the OPA, so the figures should be identical, and consequently would not report fuel which he has sold if he has not received coupons, and therefore would not be in a position to pay a tax on that additional amount without disclosing that he has sold such an excess of fuel. And so, in so far as the actual attaching of the penalties, the lien provides, and so forth, I merely want to direct the Court's attention to *ex rel Stewart*—

The Referee: I am familiar with that. That is an old classic. [217]

Mr. Stevens: I know you are familiar with it, so I won't take any further time. We rest our case upon the presumption to which I have referred.

The Referee: Mr. Pines?

Mr. Pines: I would like to take just a few minutes of the Court's time in pointing out, although such a presumption might exist between the Board of Equalization and this man, but there is another thing the Board has completely ignored: that the creditors are in a position to urge and insist that no one creditor who is not entitled to take particularly the lion's share of the assets should receive it without at least establishing that that creditor is entitled to it. What I am getting at is, if this litigation were merely between the State Board of Equalization and Mr. Lockwood——

The Referee: He is trying to make an arrangement and pay off his creditors.

Mr. Pines: That is right, with the assets. This man is insolvent. In effect, as a matter of fact, not only is he insolvent, he is hopelessly insolvent. Therefore, the Receiver representing creditors here is here to see to it that no creditor who is not entitled to share in these funds, or who has a fictitious claim is entitled to it. The Board of Equalization will verify the fact that Mr. Lynch as the Receiver opened up the books of the Debtor and lent every possible cooperation. Now, it resolves itself into this. [218] In the early stage of this proceeding, as a matter of fact, the Court will recall that as counsel for the Receiver I conducted some

examinations of Mr. Lockwood myself to determine why these discrepancies in these books existed, and what was the basis for this thing. When we finally reached the point where we thought we understood, we came to the conclusion that there is no tax due and owing to the Board of Equalization, that it was based upon an assumption, and perhaps Mr. Lockwood can't admit it, which I can surmise, but I think I know what the crux of this matter was. I think that there was a juggling of gasoline ration coupons during this period of time. That would not create a tax to the State Board of Equalization. It might subject Mr. Lockwood to certain penalties, and his failure to keep books might also subject him to losing his broker's license. But, your Honor, Section 7354 of the Motor Vehicle Fuel Tax Act—it is a very simple sentence, and it disposes of this whole case—it says:

“The license tax shall be imposed upon only one distribution of the same motor vehicle fuel.”

There can't be two taxes upon the same motor vehicle fuel, and no evidence in this case discloses that there was any motor vehicle fuel involved in which the tax was not paid. There was none whatsoever. I think possibly the Board of Equalization——

The Referee: Apparently these books show an excessive [219] sale.

Mr. Pines: I want to get to that. I think I have indicated to the Court there is no evidence of the physical transfer of gasoline. I have indicated to the Court what my personal opinion of that is, and that is that these duplicate invoices were perhaps

for the purpose of qualifying for additional gasoline coupons, in violation of the orders of OPA, but neither this Board nor anyone else can show that actually there was a distribution of gasoline upon which a tax became assessed.

The Referee: What would be the reasonable inference of a man acquiring a lot of gasoline? He couldn't use it for hair tonic. You know Mr. Pines, I have to take the common sense view.

Mr. Pines: Your Honor, there wasn't any evidence that there was a single gallon of gasoline in Mr. Lockwood's possession in excess of that which he purchased.

The Referee: In his possession?

Mr. Pines: Yes, that is right. Now, you can't sell that which you don't possess physically.

Now, the point I am getting at is, I will state frankly what I believe, and I think the Court probably feels the same way about it, that the reason for the records not being consistent will probably be so that when the F.B.I. or somebody else came along to examine this man's records to see why so many gasoline coupons were handled—I wouldn't [220] be surprised if there was a lot of juggling. Let's concede that for a moment. Does that entitle the Board of Equalization to come in and receive a tax which it is not otherwise entitled to? Is there any law which gives the Board of Equalization the power to collect three cents per gallon on any gasoline which was not distributed?

The Referee: What stymies me is, why did the man put it in his books?

Mr. Pines: I am speculating.

The Referee: Then why did he put it in his books?

Mr. Cobb: It isn't in his books. They found all the delivery slips.

Mr. Pines. Let's assume that this man had reported income for income tax purposes, the bankrupt had reported income for income tax purposes which he had not actually earned. Do you mean that this court would nevertheless approve a claim of the Collector of Internal Revenue and take out of the estate of an insolvent debtor money to pay a fictitious return, even though this man may have had an ulterior motive, perhaps, in reporting that income? Perhaps someone else had earned it, and he was in a lower bracket, and he put it in his return. The Government wouldn't be entitled to that tax, because taxation is a realistic thing. There are innumerable cases in which our United States Supreme Court has held that substance and not form is the basis of tax determination. [221]

Now, we must reach the substance of this transaction. If for any reason or ulterior or selfish motives, or perhaps illegal motives, this debtor had created a situation, and upon the face of it made it appear that he had handled gasoline, more gasoline than he actually did, that does not create the tax.

Now, the Board of Equalization would have to show that there was a distribution of gasoline here upon which the tax was not paid. I speak of distribution, not resale by a broker. A broker doesn't pay any tax.

The Referee: I understand that.

Mr. Pines: A broker doesn't pay any tax. It is always the distributor. This man is only a distributor, even as an unlicensed distributor, if it is assumed he intentionally and knowingly blended—let's assume that he is an unlicensed distributor of that which he blended. Under the circumstances I don't think there is any question about that, that there hasn't been any proof that a taxable transaction has taken place in this instance, and that is the reason why, your Honor, I objected to a lot of the mass of this testimony which had no bearing actually upon the issues here.

Mr. Cobb: Your Honor, I would like to point out this blending we talk about that made him a distributor, there are cases that he was a distributor. It occurred in July. They were down there the same day. He readily admitted he put this in the other. They didn't say, "Take out a [222] distributor's license." He was licensed through an error. They didn't make an assessment here until August 6, 1946, by their own exhibit. They are just now setting for hearing the revocation of his broker's license. They all recognized it was an error, an innocent error. They even went back to the refiners and checked. They told your Honor they had been out in the field watching to see there was no gasoline entered the channels of trade that was not tax paid. Nowhere is there any evidence—we have Mr. Lockwood's testimony that every gallon he bought was from a refiner that was a distributor. His records correspond with the refiners' records. They have checked that. There is nothing wrong there.

He bought it from these people that were distributors, and the tax was paid. The only thing we have is that his records show that he sold or delivered more gasoline than he bought. That is what it boils down to. That does not prove that they are entitled to impose a tax here unless it is shown that he sold the gasoline on which the tax had not been paid for consumption of motor vehicle fuel, and no tax has been collected. In other words, the case they have offered is built up on presumptions, and trying to take advantage of a situation they find when it was an impossible bookkeeping situation.

Now, the penalty for failure to keep proper records is the revocation of a license. They have known this ever since these investigators were down there last July. Now, [223] that doesn't give them the right to impose a 100 per cent penalty and take all the money from this estate; and I will say to your Honor frankly, the evidence shows he doesn't owe this tax. If he does owe it, I have told counsel we will have to file an immediate consent for adjudication. And when this tax is paid, there won't be five per cent for the merchandise suppliers, and the State walks off with all this estate for a failure to keep proper records. That is really what he is charged with here. They haven't shown he sold to John Smith here gasoline that was used in a motor vehicle in excess of what he bought. He would have had to get the gasoline from someone, and don't tell me with the amount that is involved here, they wouldn't have had somebody in jail before now if

there was anybody selling gasoline around this State without collecting the tax on it.

Mr. Stevens: With respect to Mr. Pines' remarks about juggling of the books for the OPA, that is answered by the books themselves. Obviously Mr. Lockwood would not set up more sales than he had purchases in order to cover extra coupons. That just wouldn't satisfy the OPA. So far as the explanation about the fictitious sales invoices to cover just the purchase of ration stamps, I think that is answered by Mr. Lyles' testimony here that he checked their cost, checked those supposed duplicate sales, and found that they were actual bona fide sales, as evidenced by the customers' checks which had been cashed by Mr. Lockwood. [224]

Mr. Cobb: There was only a portion, he said, that he checked.

Mr. Stevens: Well, your Honor knows the evidence so far as the percentages that were checked. They were checked so far as possible. So far as that ration stamp explanation is concerned, I think your Honor will bear in mind that the only explanation that was brought out in that regard was a couple of questions by Mr. Cobb of Mr. Williams when he was on the stand. They didn't elect in their direct examination to make that their explanation, and I don't think that they have the matter properly before your Honor to raise that issue. The fact that we agree that there is the fact established here that he sold more gas than he has bought—we do submit to your Honor that the only possible way to enforce

this tax is, after giving Mr. Lockwood all the possible opportunity to explain where he got the gasoline from, and bearing in mind, too, that in connection with Mr. Cobb's own questioning he brought out from our witnesses the fact that they had checked all of the regular distributors who furnished Mr. Lockwood with gasoline, and didn't find any discrepancy for the amounts reported, shows he must have obtained that gasoline from some other source, and there is no way to show it is a tax-paid source.

Mr. Pines: I think we are left in this anomalous position: The State insists that the creditors of this estate should be penalized because perhaps Mr. Lockwood [225] couldn't afford to take the stand and incriminate himself personally.

The Referee: Mr. Pines, I don't differentiate between creditors. A tax creditor is a creditor the same as anybody else.

Mr. Pines: As a matter of fact, as attorney for the receiver we would be fighting for them if there was any tax, but counsel hasn't shown that one gallon of gasoline was handled where the tax was not paid on it.

The Referee: I am thoroughly satisfied that this man sold lots of gasoline on which he didn't pay any tax, and I will allow this claim as a proper claim. I remember Mr. Williams' testimony here, which wasn't refuted, that he asked Mr. Lockwood about his tickets, and Mr. Lockwood turned to him and said, "If I told you the whole story, it would involve lots of people."

Mr. Pines: That is my point.

The Referee: This is a good, valid tax claim.

Mr. Pines: I believe there is always a difference of opinion, but your Honor is penalizing the creditors of the estate, and penalizing Mr. Lockwood because he has some OPA violations, and making us pay for it.

The Referee: If I can't follow a man's books, what am I going to go on?

Mr. Cobb: Your Honor, there is a 100 per cent penalty. Are we going to argue that? [226]

The Referee: I don't know that.

Mr. Pines: It definitely does state that.

The Referee: Then you will have to eliminate the penalty.

Mr. Pines: To avoid an immediate review, would your Honor make his order without prejudice to a determination of the claim in the event the adjudication in bankruptcy falls, so that this matter may be urged before the Court?

The Referee: No, I am not going to go all over this again.

Mr. Pines: I am trying to conserve the assets of the estate. I am doing this in good faith. It is not sour grapes. It means in this debtor's proceeding it will have to be reviewed.

The Referee: I have been reviewed lots of times. That doesn't scare me a bit.

Mr. Pines: I am not trying to intimidate the Court. You know that. I have practiced before the Court too long. Your Honor, I trust that I have been here before the Court long enough for the Court to know——

The Referee: You have, Mr. Pines; but I have made up my mind.

Mr. Pines: I merely asked the Court to qualify his ruling so we could avoid a review.

The Referee: No, sir.

Mr. Pines: If there are no assest to cover [227] the liabilities——

The Referee: I will make that a definite ruling allowing it as a claim. Review it if you like.

Mr. Stevens: If the Court please, you did mention something about penalties. Will you read this case before you make the order?

The Referee: I will.

Mr. Stevens: Is this a final order, or do you want a formal order prepared?

The Referee: Yes, sir; you will have to have findings of fact and conclusions of law and submit it to these gentlemen for their approval as to [228] form.

Friday, December 20, 1946—10:00 A.M.

Mr. Pines: Your Honor, this motion of mine is directed against the State as well as the Debtor. Mr. Francis Cobb, who represents the Debtor, informed me last night that he had a matter before Referee Brink, a sale, which would be first on the calendar, and said that he would be a few minutes late.

The Referee: Do you want to wait for him?

Mr. Pines: Yes, your Honor, if we may.

The Referee: Have you read Mr. Stevens' order?

Mr. Pines: I was served with a copy of the order

allowing the claim a few minutes ago, the proposed order—if the Court has not already signed it.

The Referee: I have not signed it.

Mr. Pines: I would like the Court to hold it until I go over it. I have been waiting for weeks for these facts, and I think I am entitled to be heard on them.

The Referee: I have not signed it yet. I will be back in a few minutes.

(Short intermission.)

The Referee: All right, what have you to say?

Mr. Pines: Our position is simply this. I know there is a victor and vanquished in a lawsuit, and there is always a disappointment for those who go down.

The Referee: Yes, sir. [229]

Mr. Pines: On the other hand, my approach is a bit different. I think it is more objective. We represent the third parties in this dispute between the State of California and Arlie R. Lockwood, the Debtor in this proceeding. The position we took when this case first started was this, that if Mr. Lockwood owed the tax, it should be paid, but if he didn't owe the tax, obviously we didn't want to pay it. When I say we, I mean the creditors. The objections filed to the allowance of the claim set up that the tax was not owing to the State of California. Now there was nothing in the evidence through all of the lengthy proceedings which we had that was to the contrary. It was undisputed that every bit of gasoline handled had the tax paid

on it. The theory of the State was a rather novel one. That was because there were discrepancies in the reports from the actual amount of gasoline apparently handled, and that therefore since there were those discrepancies that they were permitted to make an arbitrary assessment. Whatever the case might be between the State and the Debtor himself, the Court will readily recognize it would be most inequitable that the creditors would have to pay for Mr. Lockwood's possible machinations of his books, especially if they were not on taxable transactions. As attorney for the Receiver I sat through these proceedings confident that presumption would not be invoked for charging the estate or the third parties with such a tax. The Court of course disagreed as evidenced by the ruling of [230] the Court.

Section 57 of the Bankruptcy Act provides that where a claim is allowed it can at any time thereafter be re-examined by the Court, and quite obviously for equitable reasons the Court should re-examine it. Strangely enough in the enactment of the section, Congress did not provide that where a claim was disallowed it could be re-examined. That is *res adjudicata*. But they recognize a court of bankruptcy is a court of equity, and from time to time different equities may be considered, and that at any time, even after allowance, it may be re-examined and objections heard. Therefore and for that reason the Receiver has moved this morning that we be given an opportunity for reopening and seek further evidence in this matter.

The State will have to admit that they did not introduce proof that there was any taxable evidence here. They hang their hats on the fact that Mr. Lockwood failed to explain why there were discrepancies in his books from the amount of gasoline handled, and in no part of their evidence has it been argued that actually was sold upon which a tax had not been paid, with the exception of some 700 barrels of gasoline which was blended. That does not amount to \$29,000. It amounts to less than \$100 in taxes. It is for that reason at this time the Receiver moves that the Court reopen the proceedings so as to permit us to make an audit and check for further evidence so as to bring the actual [231] facts before the Court.

Just one further thing I want to state, and that is, at the conclusion of the last hearing, the record will show the Court asked the State to prepare findings of fact and submit them to opposing counsel, and then submit them to the Court. That was some three weeks ago. Today we were served with an order allowing the claim, which contains no evidence of fact whatever with the exception of the statement that the objections were not sustained by the proof. That in itself is a dead giveaway, if the Court please. If the State were to try to produce findings of fact that there were any taxable transactions here, it would be an utter impossibility, and we ask the Court to permit us to go still further into the matter to show there was not any tax incurred in this transaction.

Now pardon me just a moment. My motion asks that the——

The Referee: That it be re-examined at the expense of Mr. Lockwood?

Mr. Pines: That is right. I thought Mr. Cobb would agree that the Debtor should pay that. He tells me the Debtor hasn't any money and that whatever money there is is in the possession of the Receiver, which is about \$2,500. Of course, if that is the situation, we have to rely upon the Court indicating to us what portion we may use for such an audit. I feel that even if no audit were made I think [232] the Court should reopen the matter and permit us to bring Mr. Lockwood and other witnesses in and find out about it—assuming there was testimony withheld here, assuming there were evidences of Black Market operations or anything else—I think we ought to find out what actually took place.

The Referee: You had Mr. Lockwood on the stand time and time again.

Mr. Pines: I felt the burden was upon the State.

The Referee: Is he any more disposed now to tell us the facts than he was then?

Mr. Pines: If I can't get it from Mr. Lockwood I will try to get it from other people. I am inclined to believe that I can get it from Mr. Lockwood. Frankly I didn't go too far in that respect for the reason I felt the burden was on the State to prove the claim, but the Court should realize I am conscientious when I say that I didn't think they proved it, and if he had some reason to avoid tes-

tifying, that might incriminate him, it did not affect me particularly, but now that it does affect the pocketbooks of the creditors I don't care whether it incriminates him or not, especially if there is no tax resulting therefrom.

Mr. Stevens: We don't question the Court's right to grant the motion that is being sought here. I don't think Section 57 applies as yet because the formal order of this Court has not been signed.

Mr. Pines: That is true. I am trying to save you [233] that expense.

Mr. Stevens: I may disagree with the construction, but if the order is signed and becomes final, then I think Section 57 probably applies to the type of allowance. Be that as it may, it is not involved in this particular motion at this time.

From what Mr. Pines has said it seems he is laboring under a misapprehension as to the State's position in this case. We do not concede it was proved that all of the gasoline sold by Mr. Lockwood was tax paid because that is the reason we are here. It was because the only gas that Mr. Lockwood could show was tax paid or what he had purchase invoices for——

Mr. Pines: May I interrupt you there so that we are clear on that. Mr. Lockwood testified he handled no gasoline on which tax had not been paid, and you stipulated that if certain witnesses were brought into court they would testify the gasoline handled with them, the tax had all been paid on, and there was no evidence introduced by the State

showing any gasoline handled upon which no tax was paid. Is that right?

Mr. Stevens: No, that is not correct. If you don't mind, I would like to finish my argument.

Mr. Pines: I thought perhaps we would clear that up.

Mr. Stevens: No. So far as the evidence is concerned, the State's position is we have so much gasoline shown to [234] be sold by Mr. Lockwood, and we have that much less gasoline for which he can show it was tax paid by virtue of purchase invoices. We agreed and our witnesses testified and we have checked with the regular suppliers of Mr. Lockwood and found that all of the gasoline they sold him dovetailed with what they reported, but we still had left a large segment of gasoline and we cannot tell whether or not there has been any tax paid. Under the circumstances, after the long hearing we had, it was up to the Receiver and Mr. Lockwood to show that that gasoline was tax paid, and we think the presumption upon which we relied that Mr. Lockwood is the only one who will give us that information, and if he won't give it to us there is only one inference that can be drawn, and it is a presumption in law which is an inference that if Mr. Lockwood gave evidence it would be that the gasoline was not tax paid. That is not an arbitrary presumption at all. It is not one that is inequitable and unjustly enriching the State. It is based on common sense. If a man knows where he got gasoline and that it was tax paid, he would say.

and that burden Mr. Lockwood did not establish in this case.

So far as the other matters are concerned, I think your Honor will agree that the audit made by Mr. Lyles was a very complete one. I have Mr. Lyles here in court if the Referee has any doubt about the completeness of that audit. Mr. Lyles is ready to take the stand and tell you from what books it was made and show that he took everything [235] into consideration that was there at the time of the audit. Frankly I can't see how anything could be gained if there was a reaudit of these records by a C.P.A. So far as Mr. Lockwood is concerned, his own reaction was, "Well, more power to them if they can find out. I certainly couldn't, but if they can, more power to them."

In addition, we do have this change in circumstances which I think would make any reaudit at this time undesirable, and that is that certain of the records of the debtor which were available at the time Mr. Lyles and his staff made their audit are no longer available; they aren't here and we haven't been able to find them. They are not in the Receiver's office. How can we go back and audit records which we cannot find? A good portion of the tax arose from presently unavailable records. I don't see how we can go over that situation.

The third point which I would like to raise is according to the information supplied me, just generally it is true, they did not give me exact figures because no actual appraisal has been made of the assets beyond Mr. Pines and Mr. Cobb advising me

of the value of the assets of the estate being less than the amount of our claim. So that if we do authorize a reaudit it will cost a couple of thousand dollars. Frankly I can't see what would be gained, and in the end we will be reducing our own claim that much. It doesn't seem to me that after an extensive hearing such as [236] we have had in this case—and I would like to point out that we had completed our testimony so far as the State of California's case was concerned, on the 28th of October, and we then had the last date here on the 27th day of November, during which time Mr. Lockwood was going to try to go out and bring in this explanation. I think if the Receiver was going to question this matter he should make his investigation, but he was content to rest his case and submit it for decision. Under the circumstances it doesn't seem quite equitable to open it up. I don't think anything can be gained by it. We would like to oppose the motion.

Mr. Pines: I am rather amazed at a public official taking advantage of a technical situation, that the State of California should make any claim to money unless they are entitled to it.

Mr. Stevens: I think I made my position clear that we do not intend to, Mr. Pines.

Mr. Pines: I interrupted you and I was wrong in so doing. Will you let me finish, please?

Mr. Stevens: I just wanted to get that straight.

The Referre: May I ask this: Is it true, as he says, that certain records are no longer available?

Mr. Pines: It is news to me. That is what I

want to get at. If there are any records missing, why don't we know about them?

The Referee: One factor might influence me. If you [237] were to agree to pay these expenses, that is one thing, but to penalize the taxing authority now and make them pay the expenses of it does not appeal to me.

Mr. Pines: The creditors are actually paying, if the Court please, especially if the State is able to take it on a presumption or inference. Obviously this estate is hopelessly insolvent if the State of California has a lien to the extent of \$29,000. Therefore it is of vital importance that it hang not on a legal technicality, and that the creditors will at least have had an opportunity of getting behind Mr. Lockwood's testimony and finding out whether or not there was a tax paid. Mr. Stevens very baldly admitted a few moments ago that they could not determine whether there was a tax paid or not, not upon transactions, your Honor, but because of certain duplicated invoices and statements. I think I know the reason for those duplicated statements and invoices. It is not fair for the Court to consider it as evidence. I think they were missing so as to cover up illegal gas coupons that were handled.

The Referee: Do you want me to put a stamp of approval on that type of transaction?

Mr. Pines: Definitely not, and if this justifies your reporting it to the United States Attorney's office, that is something else, but that doesn't justify the Court giving the State of California \$29,000

because there is no tax on the handling of Black Market gasoline as such. There is a [238] tax upon every gallon of gasoline upon which tax had not been previously paid.

The Referee: I realize that.

Mr. Pines: Section 7354 says specifically there is a tax on one distribution only, and every subsequent distribution—you can have 39 distributions and there is only one tax. We would like to satisfy the Court on that. If we can't, that is something else again.

The Referee: Mr. Cobb, do you want to say anything?

Mr. Cobb: Not at this time, your Honor.

Mr. Gemmill: Your Honor, I am one of the attorneys for the Elm Oil Company having a claim in excess of \$15,000 in this matter. I have been authorized to speak for the Palomar Refining Company having a claim of approximately \$4,000. That is out of a total of something like approximately \$25,000 in unsecured claims in this case. I think it is pretty obvious to the Court from the statements that have been made here this morning as to the approximate value of the estate and that in actuality this is really a contest between the State of California and the unsecured creditors because obviously if the State's claim is allowed there will be nothing left to unsecured creditors due to the fact that is a preferred claim.

The Referee: That happens pretty nearly every day. They come in and wipe it out. It isn't a novel

situation to me. Taxes are legally imposed, and if they have a lien [239] they clean it out.

Mr. Pines: That is right, but where they cannot prepare findings of fact because there aren't any facts to justify the tax——

The Referee: Oh, we have that happen every day with the Government. If it is a legal obligation and they are entitled to it, they should have it.

Mr. Gemmill: But since this is a question between the State and the unsecured creditors—it is not a question in which inferences such as Mr. Stevens referred to in order to substantiate his claim should be indulged in against the unsecured creditors.

The Referee: Let me ask you, what effort did you or your client make to reveal the true state of facts while these proceedings were in progress? Did you make any effort?

Mr. Gemmill: I wasn't here during the entire proceedings.

The Referee: I saw you once or twice.

Mr. Gemmill: I was here at the first hearing. My client sat through all of the hearings and he was ready to testify to anything he knew about. I understood later his testimony was stipulated and he did not take the stand. He has been at all times ready and he is now ready to testify to anything that had anything to do with the matter.

Now on the subject of the audit and what it might [240] reveal, I understand the question of the actual income and expenditures of this business during the period of operation was something that

was not gone into. I might be mistaken about that, but that is my understanding. I believe at the very least that is something that should be covered by an audit and should be submitted to the Court, because it has a relevant bearing upon the subject. I think that is about all I have to say.

Mr. Cobb: I would like to add this, your Honor. I don't know about this proposed audit, but I think clearly in the first place we are entitled to findings because it was admitted that a portion of these assessments were duplications on certain exhibits that we offered here. Furthermore, I think under the law the claim including 50 per cent penalty is contrary to the Bankruptcy Act and should not be allowed. This was not a case where the assessment had become final before bankruptcy. They filed the assessment and the time to object and ask for a hearing before the Court had not expired, so in my opinion there isn't any justification under the law for allowing a penalty of 50 per cent, especially with the inhibition that is found in the Bankruptcy Act which they are asking in their order today. I mention that before I go into the facts.

I feel like Mr. Pines does, and as your Honor stated at the commencement of the proceedings, that the burden was on the State to prove its claim, and if they had the evidence, [241] that was one thing, but your Honor wasn't going to allow a \$30,000 claim unless there was some evidence. According to the evidence offered they merely found some delivery slips showing deliveries which were not re-

corded in his book, and the total of those deliveries amounted to X gallons of gasoline on which they based their tax. Those delivery slips were explained, how duplicates would arise, because one slip would be made out by a truck driver. Later Mr. Lockwood would go out to collect and take the money and the stamps and turn it over to the bookkeeper, and the additional slip handled by the truck driver was put in this drawer. It was admitted by their investigators that they spent time trying to investigate these deliveries and they could not determine whether they were all right or not. The only thing they based it on was what they found in these delivery slips. Even the evidence they have isn't sufficient to even raise the presumption that there was a delivery of and sale of gasoline or the type of gasoline or whether it was tax paid. In other words, we have a situation where nobody in California can go out and buy gasoline without paying a tax on it, unless they steal it, or as they point out with one or two exceptions, and they admitted they had investigators watching the refineries. They were watching this thing for a long period of time, and we know from a practical standpoint that this gasoline, if he did sell it, as shown in these delivery slips, was tax paid gasoline, otherwise they would [242] have caught up with the source of it. It wasn't just one day; it went over a long period of months. They had a lot of men watching the situation. Undoubtedly it was tax paid gasoline. The amount that these delivery slips show I don't think is sufficient to constitute any

presumption that would impose this liability. I feel it is not a proper claim, that they have not proved their case, that it was based merely upon suspicion and upon records which they say in one breath are not correct, and then they take the records in the other breath to show that he is liable for the amount of delivery. I don't think there has been any proof of sale of any gasoline on which a tax had not been paid.

The Referee: I am satisfied my original ruling was correct. It is for Mr. Lockwood to tell us what the truth was. He sat here day after day and didn't do that. Now then, if creditors have to suffer, that is no reason why I should believe Mr. Lockwood. I don't think he told us any part of the truth at any time.

Mr. Pines: May we have findings of fact?

Mr. Stevens: May I make a statement about the findings in regard to what Mr. Pines has said?

The Referee: I think you had better make them more elaborate than you have here. You have just a blanket statement.

Mr. Stevens: It will be of benefit to me if we could discuss it for a moment. As I understand the issues in this [243] case, they are the objections which have been contained in the objections of the Debtor and the Receiver. Those are the issues of fact.

The Referee: Yes, sir.

Mr. Stevens: I took this particular form from Remington's Form Book. It is one which is acceptable to the bankruptcy profession. The two

forms, one denying the objections and one allowing the objections, both follow the same form.

The Referee: If you are willing to stand on it, I will sign it.

Mr. Pines: Those are orders, but they are not findings. The Court ordered that findings of fact be submitted.

The Referee: Yes, I think you should make them more full.

Mr. Stevens: Then shall I go outside of the objections? That is what I want to know.

The Referee: I would make a finding on every objection.

Mr. Stevens: Very well, sir.

Mr. Cobb: In the Superior Court you have to find the ultimate fact.

The Referee: The forms put in these law books are often times treacherous and lead us into pitfalls.

Mr. Stevens: I will be glad to make a finding on each objection. [244]

The Referee: So I won't sign this order allowing the claim until you get some findings in there.

Mr. Pines: May we be permitted to approve those findings as to form, your Honor?

The Referee: Oh, surely.

Mr. Stevens: You hold them five days after you receive them until you sign them?

The Referee: Yes.

Mr. Pines: I am sure we will have requested findings after it is submitted.

Mr. Cobb: What about the penalties?

The Referee: I don't know, Mr. Cobb. I think they should all go in on the same basis.

Mr. Pines: One more thing. This is a Chapter XI proceeding, and quite obviously I am going to move that the Debtor be adjudicated a bankrupt.

The Referee: I wrote a letter to Mr. Lynch this morning. He told me he could not get in touch with Mr. Lockwood to make certain reports. Mr. Lockwood apparently is not cooperating with Mr. Lynch. That is what Mr. Lynch told me. I don't know. I get complaints from different people. He says he can't find him, that he is always some other place. It would be advisable, I think, for Mr. Lockwood to let Mr. Lynch, the Receiver, know where he can get in touch with him. I don't know whether this is true or not. I am just quoting Mr. [245] Lynch.

Mr. Pines: Irrespective of whether or not the claim is sustained or allowed later on, it is obvious with the present order allowing the claim that it will have to be adjudicated because a plan of arrangement could not possibly be consummated. I think perhaps Mr. Cobb might stipulate to that.

Mr. Cobb: We can probably save you some time in that connection.

Mr. Pines: I think Mr. Cobb can probably stipulate.

The Referee: I think you had better send up a written order of consent.

Mr. Cobb: I think that would be the better way to do it.

The Referee: Then we will have something in the record.

Mr. Pines: That is a better way to do it.

The Referee: All right, gentlemen. [246]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter for the Honorable Hugh L. Dickson, Referee in Bankruptcy, do hereby certify that the foregoing 246 pages comprise a true and correct transcript of my shorthand notes of the testimony given in the above-entitled matter.

Dated this 6th day of October, 1949.

/s/ BYRON OYLER,
Official Court Reporter.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 114, inclusive, contain the original Referee's Certificate on Review; Proof of Priority Claim for Taxes; Notice of Hearing on Objection to Claim; Objection to Claim of Controller of the State of California; Amended Proof of Priority Claim for Taxes; Objection to Amended Claim of Controller of the State of California;

Order Allowing Claim after Hearing Objections Thereto; Petition for Instructions; Order on Receiver's Petition for Instructions; Petition for Review of Referee's Order Allowing Claim After Hearing Objections Thereto; Petition for Order to Show Cause; Order to Show Cause; Affidavit of Service by Mail; Order re Omission of Narrative Statement of Evidence and Reporter's Transcript from Referee's Certificate on Review; Referee's Supplementary Certificate on Review; Nunc Pro Tunc Order Amending Order Allowing Claim After Hearing Objections Thereto; Findings of Fact and Conclusions of Law Re Claim of the Controller of the State of California; Points and Authorities of Receiver and Debtor (Separate) on Review; Notice of Motion; Points and Authorities; Notice of Motion for Order to Permit Addition of Reporter's Transcript to Record on Review with Points and Authorities and Affidavit in Support; Memorandum on Review; Findings of Fact and Judgment on Petition for Review and Order Thereon; Notice of Appeal; Undertaking for Costs on Appeal and Designation of Record on Appeal and full, true and correct copies of Debtor's Petition Under Chapter XI of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference and Minute Order Entered February 28, 1949, which, together with the original Reporter's Transcript of Proceedings before the Referee on Hearing on Objections of Debtor and Receiver to Claim of the Controller of the State of California, etc., on October 22 and 28, November 1 and 27, 1946, transmitted

herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.75 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of December, A.D. 1950.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12782. United States Court of Appeals for the Ninth Circuit. Controller of the State of California, Appellant, vs. Arlie R. Lockwood, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 22, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12782

CONTROLLER OF THE STATE OF CALI-
FORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, Controller of the State of California,
intends to rely on appeal on the following points:

1. The Honorable Harry C. Westover, District Judge, erred in holding that the record herein does not support the findings made by the Referee.

2. The Honorable Harry C. Westover, District Judge, erred in setting aside and vacating the Findings of Fact, Conclusions of Law and Order of the Referee allowing in full the tax claim of appellant in the sum of \$31,160.31 plus interest in the sum of \$71.42 per month or fraction thereof after December 31, 1946, to date of payment.

3. The Findings of Fact, Conclusions of Law and Order made by the Honorable Harry C. West-

over, District Judge, are not supported by the record herein.

4. The Honorable Harry C. Westover, District Judge, failed to apply the laws of the State of California in considering the validity of the tax claim allowed by the Referee.

5. The District Court erred in permitting others than the bankrupt (formerly the debtor) to review the Referee's Order allowing appellant's tax claim, as set forth above, despite the fact that only the bankrupt had petitioned for review of the Referee's Order.

6. The District Court erred in permitting parties not petitioning for review of the aforesaid Referee's Order to participate therein by furnishing and paying for a reporter's transcript of the proceedings before the Referee, overlooking the fact that pending before the District Court was Mr. Lockwood's Petition for Review and not a Petition for Review filed by the trustee of Mr. Lockwood's estate or by any other creditor thereof. Reference to the record herein will disclose that the Referee duly made an Order on January 21, 1947, directing the trustee herein, who, at the time, was acting as receiver under Chapter XI, not to file a Petition for Review.

7. The Honorable Harry C. Westover, District

Judge, erred in failing to affirm the Order of the Referee allowing the claim of appellant in full.

Dated: December 28, 1950.

FRED N. HOWSER,

Attorney General,

JAMES E. SABINE,

Deputy Attorney General,

/s/ EDWARD SUMNER,

Deputy Attorney General,

Attorneys for Controller of the State of California.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed December 29, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

Appellant, Controller of the State of California, claimant, hereby designates the entire record and all of the proceedings and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal as material to the consideration of the appeal and appellant hereby requests that the entire record and all of the proceedings and evidence be printed.

Dated: December 28, 1950.

FRED N. HOWSER,
Attorney General,

JAMES E. SABINE,
Deputy Attorney General,

/s/ EDWARD SUMNER,
Deputy Attorney General,

Attorneys for Controller of the State of California.

Affidavits of Service by Mail Attached.

[Endorsed]: Filed December 29, 1950.

No. 12782.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

EDMUND G. BROWN,
Attorney General;

JAMES E. SABINE,
Deputy Attorney General;

EDWARD SUMNER,
Deputy Attorney General,
600 State Building,
Los Angeles 12, California,
Attorneys for Appellant.

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No. 12782.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

Preliminary Jurisdictional Statement.

Arlie R. Lockwood filed his Petition under Chapter XI of the Bankruptcy Act with the District Court of the United States for the Southern District of California, Central Division, on the 30th day of August, 1946 [Tr. 3-10], the United States District Court as a court of bankruptcy having jurisdiction pursuant to the Act of July 1, 1898, as amended. (Ch. 541, Secs. 1, 2, 30 Stat. 544, 545 as amended; United States Code, Title XI, Ch. 1, Sec. 1, Ch. 2, Sec. 11.) Lockwood's Petition was approved by the Honorable Ben Harrison, Judge of said Court, and the matter referred to Hugh L. Dickson, Esq., one of the Referees in Bankruptcy of said Court. [Tr. 10-11.] Thereafter, on October 4, 1946, and within the time provided by law, appellant, Controller of the State of California, duly filed his proof of claim for taxes due from

Lockwood under the California Motor Vehicle Fuel License Tax Law, California Revenue and Taxation Code, Sections 7301-8403, the amount of tax liability disclosed by said proof of claim amounting to the sum of \$29,280.85, plus additionally accruing interest in the sum of \$67.35 for each and every month or fraction thereof commencing November 1, 1946. [Tr. 11-12, 20-22.]

On October 11, 1946, Arlie R. Lockwood, as Debtor in the aforesaid pending Chapter XI proceedings, and E. A. Lynch, the duly appointed Receiver therein, filed objections to the aforesaid claim of appellant, the objections being predicated upon the allegations that Mr. Lockwood was not indebted to appellant for any of the tax items set forth in the aforesaid proof of claim, that Mr. Lockwood had not sold or distributed the gallonage of gasoline upon which the aforesaid proof of claim was predicated and that the tax assessment upon which the proof of claim was predicated had been made solely upon suspicion and without any legal or factual basis. [Tr. 12, 24-25.] The aforesaid objections of Mr. Lockwood and E. A. Lynch, as Receiver for Mr. Lockwood's estate, were duly set for hearing on October 17, 1946, before the Honorable Hugh L. Dickson, the Referee in Bankruptcy to whom the pending proceedings had been referred, and on that date with the consent of the Court appellant filed an amended proof of claim for taxes due under the California Motor Vehicle Fuel License Tax Law in the sum of \$31,017.47 plus additionally accruing interest in the sum of \$71.42 for each and every month or fraction thereof commencing November 1, 1946. [Tr. 12, 26-32.] On October 22, 1946, Mr. Lockwood and E. A. Lynch, as Receiver of Mr. Lockwood's estate, filed their objections to the aforesaid amended claim on the same grounds as set forth in their

former objections, additionally objecting to the inclusion of penalties and interest and alleging also that appellant's claim did not sufficiently itemize the transactions upon which the tax assessments were predicated. [Tr. 12-13, 33-35.]

The objections filed by Mr. Lockwood and E. A. Lynch, as Receiver for Mr. Lockwood's estate, to appellant's afore-said amended proof of claim regularly came on for hearing before the Honorable Hugh L. Dickson, the Referee in Bankruptcy having jurisdiction of the matter, on the 22nd and 28th days of October and on the 1st and 27th days of November, 1946. After oral and documentary evidence had been introduced on behalf of all interested parties and the matter fully argued before the Referee, the Honorable Referee found that the objections raised by Mr. Lockwood and Mr. Lynch to appellant's amended claim had not been sustained and on January 16, 1947, the Referee formally entered his order that said objections be overruled and that the claim be allowed in full as a prior lien claim for taxes in the sum of \$31,212.08, together with additionally accruing interest in the sum of \$71.54 for each and every month or fraction thereof after December 31, 1946, to date of payment. [Tr. 13-14, 35-36.]

Four days after the Honorable Referee made his Order overruling the objections filed by Messrs. Lockwood and Lynch, Mr. Lynch filed a Petition for instructions as to whether he should file a Petition for Review of said Order [Tr. 14, 37-38] and on January 21, 1947, the Referee, finding that it would not be to the best interests of Mr. Lockwood's estate that such a review be taken, ordered and instructed Mr. Lynch, as Receiver, not to file a Peti-

tion for Review. [Tr. 14, 39.] *No appeal was taken from the Referee's Order instructing Mr. Lynch, as Receiver, not to petition for review.*

The Receiver having been instructed not to petition for review of the Referee's Order, Mr. Lockwood himself, as debtor in the pending Chapter XI proceedings, proceeded on his own to file a Petition for Review of the Referee's Order allowing appellant's claim. [Tr. 14-15, 40-44.] Although Mr. Lockwood's Petition for Review requested that a reporter's transcript of the hearings had before the Referee be attached to the Referee's certificate, neither Mr. Lockwood nor his attorneys took any action to initiate the preparation of that transcript, although repeatedly requested to do so by attorneys for appellant. Furthermore, although Mr. Lockwood was ordered, upon a Petition filed by appellant, to appear before the Referee on the 17th day of July, 1947 (seven months after the entry of the Referee's Order overruling Mr. Lockwood's objections to appellant's claim) and show cause why the Referee should not prepare his certificate on review without adding a reporter's transcript thereto but adding only the items thereafter in fact attached, as disclosed by the record herein, neither Mr. Lockwood nor his attorneys appeared at the time set, and the Referee accordingly made his Order for the preparation of his certificate on review as prayed for by appellant. [Tr. 15-19, 49-52.]

On November 4, 1947, the Referee filed his certificate on review [Tr. 11-19] and on January 5, 1948, after Mr. Lockwood's Petition for Review had been submitted upon the filing of briefs, District Judge Harrison remanded the matter to the Referee with directions to prepare adequate Findings of Fact and Conclusions of Law to preclude a reversal by the Circuit Court on technical

grounds. Thereafter, the Referee made and entered a *nunc pro tunc* order amending his previous order allowing appellant's claim to conform to the figures disclosed thereon to correct an inadvertent clerical error [Tr. 54-55], and on September 23, 1948, the Referee made, signed and filed his Findings of Fact and Conclusions of Law. The *nunc pro tunc* order, as well as the Findings of Fact and Conclusions of Law, were thereafter transmitted to the District Judge before whom Mr. Lockwood's Petition for Review was pending as attachments to the Referee's supplementary certificate on review dated January 28, 1949. [Tr. 53-54.]

On February 10, 1949, Mr. Lockwood having been adjudicated a bankrupt and E. A. Lynch thereupon having been appointed as Trustee in Bankruptcy to succeed himself as Receiver under Chapter XI, the attorneys for the Trustee filed a motion in the District Court for an order permitting the Trustee to furnish and add to the record on Mr. Lockwood's Petition for Review a reporter's transcript of the proceedings had before the Referee. [Tr. 63-72.] As is disclosed in the affidavit filed by attorneys for the trustee in support of the aforesaid motion [Tr. 71], representations were made to the Court that the expense of preparing the reporter's transcript would be borne by some of Mr. Lockwood's creditors. On the 28th day of February, 1949, District Judge Campbell E. Beaumont made his minute order granting the motion filed by attorneys for the trustee that a transcript be prepared and added to the record on Mr. Lockwood's Petition for Review and ordered that the transcript be pre-

pared at the expense of Ben Hur Refining Company, one of Mr. Lockwood's creditors, despite the fact that the only petition pending before the Court was a petition filed by Mr. Lockwood himself.

Thereafter, the Honorable Harry C. Westover, District Judge to whom Mr. Lockwood's Petition for Review originally pending before the Honorable Campbell E. Beaumont had been reassigned, reversed the Referee's Order allowing appellant's claim in full and instructed the Referee to disallow the entire claim on the ground that the Referee's findings were not supported by the evidence. [Tr. 73-85.] Judge Westover's formal Findings, Conclusions of Law and Judgment were signed by him on November 3, 1950, and judgment entered that same day. [Tr. 80-85.]

Within the time allowed by law, and in accord with the Rules of this Court, appellant filed his Notice of Appeal from the Order of the Honorable Harry C. Westover reversing the Order of the Referee below [Tr. 86]; Undertaking for Costs on Appeal [Tr. 86-89]; Appellant's Designation of Record on Appeal [Tr. 89-91]; Statement of Points Upon Which Appellant Intends to Rely [Tr. 323-325]; and Appellant's Designation of Record to be Printed. [Tr. 326.]

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act. (Act of July 1, 1898, as amended; Chapter 541, Secs. 24, 25; 30 Stat. 533, as amended; United States Code, Title XI, Ch. 4, Secs. 47 and 48.) Appellate jurisdiction in this matter vested in the Court of Appeals upon the filing on November 29, 1950, of the Notice of Appeal, the amount involved being in excess of \$500.

II.

Statement of the Case.

Inasmuch as the District Judge predicated his Order reversing the Referee's allowance of appellant's claim upon the sole ground that the Referee's findings were not supported by the record, we present herewith an analysis of appellant's claim and an analysis of the testimony and evidence offered by Mr. Lockwood and the then Receiver in support of their objections to said claim as well as the additional testimony and evidence offered on behalf of appellant in support of his claim.

A. Appellant's Claim.

The claim under consideration is the "Amended Proof of Priority Claim for Taxes" which was filed with the Court's consent on October 17, 1946. [Tr. 12, 26-32.] The proof of claim discloses on its face that Mr. Lockwood was indebted to the Controller of the State of California for taxes, penalties and interest accrued under the provisions of the California Motor Vehicle Fuel License Tax Law, California Revenue and Taxation Code, Sections 7301-8403, as the result of illegal distributions of motor vehicle fuel disclosed by an audit of Mr. Lockwood's books and records for the months of January, May, June, July and September, 1945, and April and May, 1946. The exhibits attached to appellant's proof of claim are copies of the assessments or "determinations" of the liability disclosed by audit of Mr. Lockwood's books and records, the assessments being predicated upon illegal distributions of 5,149 gallons of motor vehicle fuel in January of 1945; 73,156 gallons in May of 1945; 216,539 gallons in June of 1945; 139,597 gallons in July of 1945; 17,787 gallons in September of 1945; 20,988 gallons in April of 1946; and

2,920 gallons in May of 1946. [Tr. 28-32.] Inasmuch as the rate of tax per gallon, penalty and interest is specified by the taxing statute, all amounts of tax, penalty and interest disclosed on appellant's proof of claim and attached exhibits can be simply verified by reference to Sections 7351, 7726-7728, inclusive, and 7706.

B. Analysis of Testimony and Evidence Offered Before the Referee in the Course of Hearings Had on Objections to Appellant's Claim.

Although the hearings before the Referee were initiated by the filing of objections by Mr. Lockwood and Mr. Lynch, the Receiver in the then pending Chapter XI proceeding, the reporter's transcript discloses that appellant, rather than the objecting parties, was compelled by the Referee to go forward and establish the validity of appellant's claim despite the well-established principle that verified proofs of claim are *prima facie* valid. [Tr. 95-97.] It is also to be noted that although appellant's counsel sought at the outset of the hearings before the Referee to offer in evidence certified copies of the assessments (determinations) attached to appellant's proof of claim as Exhibits "B," "C," "D," and "E" in accordance with the provisions of the California Motor Vehicle Fuel License Tax Law, pursuant to Section 7730 of that Law, to make the *prima facie* showing specified by that Law, he was not permitted to do so, it being the Referee's ruling that the items were not admissible until Mr. Lockwood's tax liability had otherwise been established. [Tr. 93-101.]

It being the Referee's position, as aforesaid, that appellant had the burden of going forward as well as the burden of proving that his claim was allowable, despite the fact that the noticed hearing before the Referee was

a hearing upon objections filed by Mr. Lockwood and the Receiver in the then pending Chapter XI proceedings [Tr. 33-35], the first witnesses called on behalf of appellant were Harold S. Williams, Supervising Investigator for the California State Board of Equalization (the duly constituted State agency charged with the administration—although not the collection—of the tax imposed by the California Motor Vehicle Fuel License Tax Law) and Joseph C. Akers, an attorney also employed by the California State Board of Equalization. Appellant's counsel sought through these two witnesses to lay the foundation for the introduction of the aforesaid certified copies of the assessments. Appellant's counsel was unsuccessful in this connection but counsel for the objecting parties did stipulate [Tr. 107] that Mr. Lockwood had paid no taxes under the California Motor Vehicle Fuel License Tax Law as a distributor. The Referee reiterated his ruling that the objecting parties did not have to proceed in support of their objections but that the burden of going forward and establishing the validity of appellant's claim was on appellant. Mr. Lynch was next called on behalf of appellant and his testimony in the main consisted of affirming the fact that none of the aforementioned assessments had been paid.

Mr. Lockwood was next called as a witness on behalf of appellant and he reaffirmed the fact that the aforesaid assessments had not been paid. [Tr. 113.]

Commencing at page 115 of the Transcript, Mr. Lockwood testified that he had sold gasoline in which was mixed 792 gallons of kerosene and that he had not reported and paid to the State of California any motor vehicle fuel license tax in connection with the aforesaid sale of 792 gallons of kerosene. It is clear from the transcript, at

page 119, that the assessment, a copy of which was attached to appellant's amended proof of claim as Exhibit "D," related to this kerosene gallonage; that said notice of assessment or notice of determination had been duly mailed to and received by Mr. Lockwood. Appellant's attempt at this point to establish that Mr. Lockwood had been engaged in the making of black market sales of gasoline during the taxable periods involved while gasoline rationing was in effect was frustrated by the sustaining of objections to questions propounded by counsel for appellant in that connection. [Tr. 114, 121-122.]

It having become apparent to counsel representing appellant at the hearing before the Referee that he had no choice but to accept the burden of going forward and establishing the validity of appellant's claim, he thereupon called on behalf of appellant Virgil M. Lyles, Supervising Auditor employed by the Board of Equalization, who had reviewed and audited the brokerage returns filed by Mr. Lockwood for the period January 1, 1945, to August 31, 1946, inclusive, and who had audited Mr. Lockwood's books and records for the calendar year 1945. [Tr. 129.] Mr. Lyles' testimony makes it clear that the assessments upon which appellant's claim is predicated were based upon sales of motor vehicle fuel disclosed by Mr. Lockwood's books and records which exceeded the gallonage purchased by him tax-paid from licensed distributors. Mr. Lyles' testimony regarding the manner in which he ascertained the gallonage sold by Mr. Lockwood during the months of January, May, June, July and September of 1945, and the manner in which he checked to ascertain whether the gallonage so sold had been purchased by Mr. Lockwood tax-paid from a licensed distributor clearly

supports the tax assessments attached to appellant's proof of claim.

Commencing at page 131 of the transcript, Mr. Lyles testified that in auditing Mr. Lockwood's books and records he found an opening inventory for the month of January, 1945 of 1,467 gallons. The purchases made by Mr. Lockwood during January of 1945 tax-paid from licensed distributors, as revealed by Mr. Lockwood's books and records, amounted to 116,314 gallons. This latter gallonage is within two gallons of the purchases reported by Mr. Lockwood on his broker's report. (It should be noted at this point that "broker" under the California Motor Vehicle Fuel License Tax Law does not include a distributor, it being the distributor who is subject to tax under this Law.) Adding the opening inventory for January of 1,467 gallons to the tax-paid purchases from licensed distributors during that period, it is clear that Mr. Lockwood had available for sale during the month of January 117,781 gallons of tax-paid gasoline. The sales disclosed by Mr. Lockwood's books and records, however, amounted to 122,130 gallons, or 4,349 gallons more than Mr. Lockwood's records disclosed had been acquired tax-paid from licensed distributors. This excess gallonage is the first item included in the notice of determination attached to appellant's proof of claim as Exhibit "B."

Having ascertained from Mr. Lockwood's books and records that he had sold more gasoline during January than he had acquired tax-paid from licensed distributors, Mr. Lyles then testified, commencing at page 133 of the transcript, that he continued his audit and calculations on the assumption that Mr. Lockwood had no opening inventory of tax-paid gasoline for the month of February.

Mr. Lockwood's records for February, March and April appeared to check out, leaving an opening inventory for the month of May, 1945, of 8,383 gallons. Audit of Mr. Lockwood's books and records for the month of May, 1945, disclosed that Mr. Lockwood purchased 157,055 gallons of tax-paid gasoline from licensed distributors, this latter gallonage being exactly the amount disclosed in a broker's report filed by Mr. Lockwood for that month. [Tr. 135.] Adding the opening inventory of 8,383 gallons to purchases of 157,055 gallons, it is clear that Mr. Lockwood had available for sale during the month of May, 1945, 165,438 gallons of tax-paid gasoline purchased from licensed distributors. The sales disclosed by Mr. Lockwood's records, however, amounted to 236,934 gallons, or 71,496 gallons in excess of the amount of tax-paid gasoline available for sale. This excess gallonage amounting to 71,496 gallons appears as the second item on the notice of determination attached to appellant's proof of claim as Exhibit "B."

Inasmuch as Mr. Lyles' audit of Mr. Lockwood's books and records for the month of May, 1945, disclosed sales in excess of purchases of tax-paid gasoline from licensed distributors, Mr. Lyles continued his audit and calculations on the necessary assumption that Mr. Lockwood had no opening inventory of tax-paid gasoline for the month of June. [Tr. 138, *et seq.*] The purchases of tax-paid gasoline made by Mr. Lockwood from licensed distributors during the month of June, as disclosed by his records, totaled 122,278 gallons and constituted the total gallonage of tax-paid gasoline available for sale. The sales disclosed by Mr. Lockwood's records, however, amounted to 338,817 gallons, or 216,539 gallons in excess of the amount purchased from licensed distributors and available

for sale as tax-paid gasoline. The 216,539 excess gallons sold by Mr. Lockwood during June of 1945, as disclosed by his books and records, constitute the third item on the notice of determination attached to appellant's proof of claim as Exhibit "B." [Tr. 139.]

Mr. Lockwood's sales during the month of June having exceeded the total amount of tax-paid gasoline purchased from licensed distributors, Mr. Lyles continued his audit and calculations for the month of July [Tr. 139], again upon the necessary assumption that Mr. Lockwood's opening inventory for the month of July of tax-paid gasoline amounted to zero. The purchases of tax-paid gasoline disclosed by Mr. Lockwood's books and records for the month of July amounted to 276,939 gallons and constituted the total amount of tax-paid gasoline available for sale. The sales, however, again exceeded the amount of tax-paid gasoline available for sale and amounted to 366,390 gallons, and a physical inventory taken by the investigating department of the California State Board of Equalization on the 31st day of July disclosed that Mr. Lockwood had on hand that day an additional 49,354 gallons. Adding the total amount of sales for the month of July, or 366,390 gallons, to the gallonage on hand as of July 31st as disclosed by the taking of a physical inventory on that date, we arrive at a total of 415,744 gallons, or 138,805 gallons in excess of the amount of tax-paid gasoline purchased by Mr. Lockwood during the month of July from licensed distributors. These 138,805 gallons appear as item four on the notice of determination attached to appellant's proof of claim as Exhibit "B." (It should be noted at this point that the witness Lyles explained to the Honorable Referee that brokers under the California Motor Vehicle Fuel License Tax Law may only handle

tax-paid gasoline. It should also be noted [see Tr. 141] that the physical inventory taken on July 31, 1945 disclosed 49,354 gallons on hand—there is apparently a typographical error in the transcript at page 139.)

Having tied down his calculations and audit to the physical inventory taken of the gallonage held by Mr. Lockwood on July 31, 1945, and not having a physical inventory for the close of the month of August but having such an inventory for the close of September, Mr. Lyles then continued his audit and calculations by treating the months of August and September as a unit. Taking the physical inventory of July 31, 1945, as the opening inventory for the month of August [Tr. 141, *et seq.*], or 49,354 gallons, and adding thereto 2,789 gallons of pressure appliance fuel and purchases totaling 164,081 gallons, we find that a total of 216,224 gallons of tax-paid fuel were available for sale during the month of August. Not having a closing inventory for the month of August, and Mr. Lockwood's books and records disclosing sales of 185,221 gallons during the month of August, Mr. Lyles proceeded with his audit and calculations on the necessary assumption that the opening inventory for September of 1945 was the total amount available for sale during August, or 216,224 gallons less 185,221 gallons (the sales disclosed by Mr. Lockwood's books and records), or 31,003 gallons. Adding to the 31,003 gallon opening inventory for September purchases of tax-paid gasoline disclosed by Mr. Lockwood's books and records amounting to 46,530 gallons, Mr. Lyles ascertained that the total amount of tax-paid gasoline purchased by Mr. Lockwood from licensed distributors and available for sale during the month of September, 1945, amounted to 77,533 gallons. Although the sales disclosed by Mr. Lockwood's books

and records amounted to only 63,084 gallons, the physical closing inventory for the month of September, 1945, amounted to 32,236 gallons, making a total gallonage of gasoline sold and remaining on hand in the amount of 95,320 gallons. This latter amount exceeds the total tax-paid amount available for sale (77,533 gallons) by 17,787 gallons. The excess gallonage amounting to 17,787 gallons appears as the fifth item on the notice of determination attached to appellant's proof of claim as Exhibit "B." [Tr. 142.]

After testifying, as aforesaid, how the gallonage upon which the notice of determination attached to appellant's proof of claim as Exhibit "B" was ascertained, Mr. Lyles then testified, commencing at page 142 of the transcript, that additional audit of Mr. Lockwood's records disclosed an 800 gallon error in entry for the month of January, 1945, and a 1,660 gallon item which had not been picked up previously in computing the sales made by Mr. Lockwood for the month of May, 1945. The 800 and 1,660 gallon items appear as items one and two on the notice of determination attached to appellant's proof of claim as Exhibit "C."

The District Judge in his formal order did not reverse the Referee with respect to the 792 gallons included in the notice of determination attached to appellant's proof of claim as Exhibit "D."

Commencing at page 149 of the transcript, we have Mr. Lyles' testimony describing the books and records kept by Mr. Lockwood and available for audit. The Court's attention is directed to the fact that Mr. Lockwood did not keep a general ledger for the calendar year 1945; that Mr. Lockwood did not keep a purchase record;

that Mr. Lockwood did not keep an invoice register; and that Mr. Lockwood did not keep a record of cash receipts disclosing the sources from which received. It is apparent from Mr. Lyles' testimony [Tr. 151, *et seq.*], that Mr. Lyles was compelled to check the original purchase invoices and verify them by reference to the records of Mr. Lockwood's vendors and to Mr. Lockwood's check register to ascertain purchases actually made from licensed distributors. It is to be noted that Mr. Lyles checked the records of those licensed distributors who sold to Mr. Lockwood for the purpose of ascertaining whether there were any purchases made by Mr. Lockwood of tax-paid gasoline other than those disclosed by the records upon which Mr. Lyles' audit was based. It is to be noted that Mr. Lyles did not find any additional purchases by Mr. Lockwood of tax-paid gasoline. [Tr. 151.]

It is also significant to note [Tr. 152] that in cases where Mr. Lockwood did file broker's reports, as required by the California Motor Vehicle Fuel License Tax Law, his reported purchases of tax-paid motor vehicle fuel disclosed by those reports jibed in each instance with the records upon which Mr. Lyles' audit was predicated.

Not only did Mr. Lyles check to ascertain whether Mr. Lockwood had made purchases of tax-paid gasoline from licensed distributors in addition to those disclosed by his records but Mr. Lyles also checked the records of Mr. Lockwood's vendees to ascertain whether the sales disclosed by Mr. Lockwood's records had in fact been made. We direct the Court's attention to Mr. Lyles' testimony commencing at page 152 of the transcript disclosing that he cross-checked 80% of the 1,190,446 gallons sold by Mr. Lockwood during the months of May, June, July, August and September, 1945, as disclosed by Mr. Lock-

wood's records as set forth above, and found that, of the *entire* 80% checked, *all* of the gallonage had actually been sold to and received by Mr. Lockwood's vendees. We particularly direct the Court's attention to the fact that of the 80%, or 816,000 odd gallons of sales cross-checked to Mr. Lockwood's vendees by Mr. Lyles, *he did not find a single instance in which the gallonage disclosed by Mr. Lockwood's sales records had not actually been sold to the vendees indicated.* [Tr. 154.]

The thoroughness of Mr. Lyles' audit procedure is again demonstrated by his testimony commencing at page 155 of the transcript to the effect that he also cross-checked his figures with the brokerage reports prepared by Mr. Lockwood disclosing his purchases of tax-paid gasoline from licensed distributors. And the validity of Mr. Lyles' audit was again demonstrated on cross-examination when he testified, commencing at page 162, that in cross-checking only the 80% of total sales previously referred to he found 165,502 gallons actually sold to and received by Mr. Lockwood's vendees in the month of May, 1945, in contrast to the sales reported by Mr. Lockwood on his brokerage report for that month amounting to merely 136,343 gallons. Similarly, 260,505 gallons were actually cross-checked as having been sold to and received by Mr. Lockwood's vendees during the month of June, 1945, whereas an incomplete brokerage report found in Mr. Lockwood's office disclosed sales amounting to only 217,597 gallons.

Reference to the cross-examination of Mr. Lyles, commencing at page 169 of the transcript, and the redirect examination of Mr. Lyles commencing at page 191 of the transcript, discloses again that the gallonage upon which Mr. Lockwood's additional tax liability for the

calendar year 1945 was predicated as disclosed by Exhibits "B" and "C" attached to appellant's proof of claim, was arrived at only after detailed cross-checking and verification to the fullest extent possible.

The tax liability disclosed by the notice of determination attached to appellant's proof of claim as Exhibit "E" for the months of April and May, 1946, was clearly established by the undisputed testimony of Mark Lickter, an auditor in the brokers' department of the Division of Motor Vehicle Fuel License Tax of the California State Board of Equalization. After testifying, commencing at page 197 of the transcript, that he had made an audit of Mr. Lockwood's books for the period January 1, 1946, to August 31, 1946, Mr. Lickter testified that audit of Mr. Lockwood's books and records as verified by a cross-check with the records of his vendees for the month of April, 1946, disclosed sales and a closing inventory for that month exceeding the opening inventory for that month, and tax paid purchases made from licensed distributors during that month by 20,988 gallons. It was further Mr. Lickter's testimony [Tr. 198] that Mr. Lockwood had omitted from the total sales shown on his brokerage report for the month of April, 1946, sales disclosed by various invoices which constituted a part of his records. The 20,988 gallons sold, as aforesaid, and not shown to have been purchased tax-paid from a licensed distributor were set up as item one on the notice of determination attached to appellant's proof of claim as Exhibit "E."

The 2,920 item appearing on the notice of determination attached to appellant's proof of claim as Exhibit "E" as additional gallons distributed during the month of May, 1946, were found by Mr. Lickter, and he so testified, to

have resulted from an error in addition made by Mr. Lockwood in footing the totals on his sales record. It is significant to note that the cross-examination of Mr. Lickter, like the cross-examination of the witness Lyles, served again only to establish that these witnesses had carefully computed and cross-checked all the figures used by them in the course of their audit of Lockwood's activities during the periods involved. See, also, Mr. Lickter's redirect examination [Tr. 218-219] with reference to the assessments against Mr. Lockwood for the months of April and May, 1946.

The testimony of the witness Wakefield [Tr. 220-221] discloses that Mr. Lockwood was licensed as a *broker* of motor vehicle fuel in April of 1944, and that the witness had taken Mr. Lockwood's application for the broker's license and that the witness had given Lockwood a copy of the Board's General Order relating to the requirement that brokers keep adequate records of purchases and sales. (See, also, Section 8304 of the Motor Vehicle Fuel License Tax Law, California Revenue and Taxation Code.)

The testimony of Harold S. Williams, Supervising Investigator for the State Board of Equalization, commencing at page 222 of the transcript, discloses that this witness and the witness Wakefield took the physical inventory of motor vehicle fuel held by Mr. Lockwood on July 31, 1945, *supra*. It was Mr. Williams' testimony that Mr. Lockwood had no equipment of his own for the taking of a physical inventory and that Mr. Lockwood had stated he had never taken a physical inventory of his petroleum products.

Mr. Williams further testified, commencing at page 225 of the transcript, that there were four principal sources during the period herein involved, while gasoline ration-

ing was in effect, from which tax-free gasoline might be obtained from other than a licensed refinery. The first source was untaxed gasoline sold to the Federal Government and its agencies (see the exemption provisions contained in Section 7401 of the Motor Vehicle Fuel License Tax Law, California Revenue and Taxation Code), and stolen from the governmental agency. The second source involved direct thefts from licensed distributors through collusion by employees, tank truck drivers and others. The third source involved illegally branding petroleum products and special selling of those products such as paint thinner. The fourth source was the gasoline obtained by unlicensed distributors from theoretically empty barrels or other containers obtained by them from the armed forces. For example, Mr. Williams testified to one instance where a purchaser of motor vehicle fuel containers from the armed forces accumulated 10,000 gallons of motor vehicle fuel a month by draining these theoretically empty containers. Additionally, private contractors who drained war plane fuel tanks prior to crating the planes for shipment accumulated this drained gallonage, which was, of course, untaxed.

To use the words of the Referee, "There were 109 ways of beating the laws."

Mr. Williams' testimony that Mr. Lockwood stated in his presence, as well as in the presence of the witness Lyles, that he, Lockwood, had been the biggest black market operator in gasoline in Southern California during the last six months of World War II is uncontradicted, as is Mr. Williams' testimony regarding Mr. Lockwood's possession of a large quantity of ration books and stamps and coupons apparently purchased by him in connection with his black market operations. Mr. Williams' further testi-

mony that Mr. Lockwood again attributed the discrepancies in his records to his black market operations in the presence of two other employees of the Board of Equalization is also uncontradicted. Although the attorney for Mr. Lockwood sought on cross-examination of Mr. Williams to bring out the fact that Mr. Lockwood had stated he made out false sales tickets to acquire additional ration stamps, counsel for Mr. Lockwood ignored entirely the cross-checking done by the witnesses Lyles and Lickter to the records of Lockwood's vendees.

Commencing at page 232 of the transcript, Mr. Lockwood testified that he was not a licensed distributor under the California Motor Vehicle Fuel License Tax Law and that he had been served with notices of determination, copies of which are attached to appellant's proof of claim as Exhibits "B," "C," "D" and "E." As a matter of fact, to settle this point, reference to page 235 of the transcript reveals that it was stipulated Mr. Lockwood had received the aforesaid notices of determination and that his liability under the California Motor Vehicle Fuel License Tax Law, if any, was the liability disclosed by said notices of determination.

To settle, also, any question as to whether or not all of Mr. Lockwood's records were checked by appellant as well as by Mr. Lockwood and Mr. Lynch, the then Receiver under Chapter XI presently the Trustee in Bankruptcy, the Court's attention is directed to Mr. Lockwood's testimony, commencing at page 235 of the transcript, that he had turned over *all* of his books and records to Mr. Lynch.

After counsel for appellant rested [Tr. 236], Mr. Lockwood was called as a witness in his own behalf. The sole testimony given by Mr. Lockwood conflicting with the testimony of witnesses produced on behalf of appellant was

his monosyllabic denial [Tr. 236] that he had ever purchased any gasoline from other than a licensed distributor during the periods here in question and his monosyllabic affirmance [Tr. 238] that all the gasoline purchased by him during the periods in question were tax-paid. A review of Mr. Lockwood's testimony, commencing at page 236, fails to disclose any explanation of the discrepancies discovered and verified by the auditors and investigators for the California State Board of Equalization. Although the witnesses for appellant testified that they had not only cross-checked their figures with the records of vendees for Mr. Lockwood but also had cross-checked Mr. Lockwood's purchases with the records of his vendors, none of the testimony given by appellant's witnesses in that connection was refuted or explained by Mr. Lockwood. Although Mr. Lockwood sought to infer that some of the gallonage set up by the auditors from his records was attributable to his (Lockwood's) practice of issuing duplicate invoices, he failed to explain how the auditors employed by the California State Board of Equalization in cross-checking Lockwood's records to the records of his vendees were able to verify every item of the 80% checked. Additionally significant is the fact that the objecting parties [see Tr. 243, *et seq.*] were unable to produce from Lockwood's records any duplicate invoices which might have affected the assessments under consideration. Reference to the transcript at page 246 discloses that Mr. Lockwood was given a week to examine all his records which he had previously testified had been turned over to Mr. Lynch, the then Receiver in Chapter XI proceedings, for the purpose of directing the Court's attention to all material duplicate invoicing. Although reference to the transcript, commencing at page 247, discloses that Mr. Lock-

wood had in fact three weeks during which to produce any duplicate invoices which might possibly have affected the computations made by plaintiff's witnesses, it is to be noted [Tr. 281, *et seq.*] that none of the alleged "duplications" found by Mr. Lockwood had any effect whatsoever upon the computations made by the auditors who examined Mr. Lockwood's books and records and cross-checked those books and records with the records of Mr. Lockwood's vendors and Mr. Lockwood's vendees.

Reference to the testimony of Mr. Lockwood at page 258 of the transcript, as well as to the testimony of Lloyd Dyer (a former employee of Mr. Lockwood's), and the further examination of Virgil M. Lyles, commencing at page 281 of the transcript, makes it clear that in addition to the invoices employed by Mr. Lockwood in the course of his business operation there were also employed some receipt forms which did not enter into the computations made by the auditors employed by the State Board of Equalization; and it is clear that the manner in which Lockwood's vendees paid him as evidenced by receipts would not in any way affect the gallonage disclosed by invoices cross-checked to the vendee's record of purchases.

The testimony of H. Clay Reavis, commencing at page 278 of the transcript, establishes that the records of the Bell Oil & Refining Company to and including March 31, 1946, had been audited by the California State Board of Equalization and that no sales had been made by Bell after that date. The Court's attention is directed to this testimony in view of the stipulation requested by counsel for Mr. Lockwood at page 247 of the transcript and other references to Bell Oil Company appearing in the course of cross-examination of appellant's witnesses.

III.

Pertinent Provisions of the California Motor Vehicle
Fuel License Tax Law.

SECTION 7351:

“Rate of tax. For the privilege of distributing motor vehicle fuel a license tax is hereby imposed upon distributors at the rate of three cents (\$0.03) for each gallon of fuel distributed by them in this State until July 1, 1947. Thereafter the rate shall be four and one-half cents (\$0.04½) for each gallon of fuel distributed.”

SECTION 7303:

“‘Motor vehicle.’ ‘Motor vehicle’ includes every self propelled vehicle operated or suitable for operation on the highway.”

SECTION 7304:

“‘Motor vehicle fuel.’ ‘Motor vehicle fuel’ includes gasoline, natural gasoline, and any inflammable liquid, by whatever name the liquid may be known or sold, which is used or is usable for propelling motor vehicles operated by the explosion type of engine. It does not include kerosene.

SECTION 7305:

“‘Distribution.’ ‘Distribution’ includes any of the following:

(a) The refining, manufacturing, producing, blending, or compounding of motor vehicle fuel in this State, and the sale, donation, consignment for sale, barter, or use of the fuel in this State.

(b) The refining, manufacturing, producing, blending, or compounding of motor vehicle fuel in this State from petroleum products owned by another and

the delivery of the fuel in this State to the owner thereof or to any person on his order.

(c) The importing of motor vehicle fuel into this State, and the sale, donation, consignment for sale, barter, or use of the fuel in this State unless the State is prohibited by the Constitution or laws of the United States from imposing a tax with respect to such sale, donation, consignment for sale, barter or use.

(d) The receiving in this State of motor vehicle fuel with respect to which there has been no prior taxable distribution and the sale, donation, consignment for sale, barter, or use of the fuel in this State.

(e) The withdrawal of motor vehicle fuel from storage in this State for the purpose of the sale, donation, consignment for sale, barter or use of the fuel in this State if the consummation of such purpose does not otherwise constitute a distribution taxable under this part, in which event the license tax with respect to the fuel withdrawn from storage is measured by the gallonage thereof thus sold, donated, consigned for sale, bartered or used.

SECTION 7306:

“‘Distributor.’ ‘Distributor’ includes every person who, within the meaning of the term ‘distribution’ as defined in this chapter, distributes motor vehicle fuel and also includes every person who refines, manufactures, produces, blends or compounds motor vehicle fuel in this State and every person who imports motor vehicle fuel into this State or who receives in this State motor vehicle fuel of which there has been no prior taxable distribution.”

SECTION 7307:

“‘Producer.’ ‘Producer’ includes every person, other than a distributor, engaged in the business

of producing or manufacturing kerosene distillate, kerosene, Diesel fuel, gas oil, stove oil, distillate or any other petroleum product used in, or which may be used in, the blending, compounding, or manufacturing of motor vehicle fuel. 'Producer' does not include a person whose business with respect to petroleum products is confined to the production, purchase or sale of crude oil which it is necessary to refine before it may be used in such blending, compounding, or manufacturing."

SECTION 7308:

"'Broker.' 'Broker' includes every person, other than a distributor, dealing, either as the owner or as the agent of another, in motor vehicle fuel, kerosene distillate, kerosene, Diesel fuel, gas oil, stove oil, distillate or any other petroleum product used in, or which may be used, in the blending, compounding, or manufacturing of motor vehicle fuel. 'Broker' does not include anyone dealing in such fuel or product only in quantities of less than 200 gallons nor a person whose business with respect to petroleum products is confined to the dealing in crude oil which it is necessary to refine before it may be used in such blending, compounding, or manufacturing, nor a nonprofit agricultural cooperative association, organized and acting within the scope of its powers under Chapter 4 of Division 6 of the Agricultural Code, dealing only with its members and storing, selling, furnishing or delivering petroleum products, other than the fuels with respect to which a tax is imposed under this part or Part 3 of this division, used exclusively for purposes of orchard heating to protect the crops of its members, and annually filing with the board an affidavit showing these facts."

SECTION 7352:

“Presumption of distribution. For the purpose of the proper administration of this part and to prevent evasion of the license tax, unless the contrary is established, it shall be presumed that all motor vehicle fuel refined, manufactured, produced, blended, or compounded in this State or imported into this State and no longer in the possession of the distributor has been distributed. This presumption can not be overcome by proof that the motor vehicle fuel has been converted to his own use by any person to whom the distributor has entrusted the control or possession of the fuel either as bailee, consignee, employee, or agent.”

SECTION 7353:

“Fuel deemed distributed upon revocation or cancellation of license. Upon revocation or cancellation of the license of the distributor or his cessation of business, all motor vehicle fuel remaining in his possession or ownership shall be deemed distributed and subject to jeopardy determination as provided in Section 7698 if, in the judgment of the board, this is necessary to insure payment of the tax with respect to distribution of such fuel.”

SECTION 7401:

“Exemptions: sales to United States armed forces, distributors; exports. The provisions of this part requiring the payment of license taxes do not apply to any of the following:

(a) Natural gasoline and liquefied petroleum gas distributed to a duly licensed distributor under such regulations as the board may prescribe.

(b) Motor vehicle fuel exported from this State by the distributor or delivered by the distributor to

any vessel clearing from a port of this State for a port outside of this State and actually exported from this State in the vessel.

(c) Motor vehicle fuel distributed, or delivered on the order of the owner, to a distributor who has furnished bond of one hundred thousand dollars (\$100,000) as prescribed by Section 7454 and who has established to the satisfaction of the board that this bond, together with property to which the lien imposed by Section 7871 attaches, is sufficient security to assure payment of all license taxes as they may become due to the State from him under this part.

(d) Motor vehicle fuel sold to the United States armed forces for use in ships or aircraft, or for use outside this State.

Every distributor claiming an exemption shall report the exports, sales or distributions to the board in such detail as the board may require; otherwise the exemption granted in this section shall be null and void and all the fuel shall be considered distributed in this State subject fully to the provisions of this part."

SECTION 7354:

"Tax on one distribution only. The license tax shall be imposed upon only one distribution of the same motor vehicle fuel."

SECTION 7451:

"License. Every person before becoming a distributor shall apply to the board for a license authorizing the person to engage in business as a distributor. It is unlawful for any person to be a distributor without first securing a license."

SECTION 7493:

“Notice of hearing. The notice may be served personally or by mail. If by mail, service shall be made pursuant to Section 1013 of the Code of Civil Procedure and shall be addressed to the applicant at his address as it appears in the records of the board, but the service shall be deemed complete at the time of the deposit of the notice in the mail without extension of time on account of the distance between the place of deposit and the place of address.”

SECTION 7651:

“Distributor’s report required. Each distributor shall prepare and file with the board on forms prescribed by the board a return verified by oath showing the total number of gallons of motor vehicle fuel distributed by him within this State during each calendar month, or such monthly period ended during that calendar month as the board may authorize, the amount of license tax due for the month covered by the return, and such other information as the board deems necessary for the proper administration of this part. The distributor shall file the return on or before the first day of the second calendar month following the monthly period to which it relates, together with a remittance payable to the Controller for the amount of license tax due for that period less whatever amounts may have been paid theretofore for the same period because of returns and payments made on a weekly basis.”

SECTION 7700:

“Petition for redetermination; security. The distributor against whom a jeopardy determination is made may petition for the redetermination thereof pursuant to Article 3.5 of this chapter. He shall, however, file the petition for redetermination with the board within 10 days after the service upon him of notice of the determination. At the time of filing the petition for redetermination, the distributor shall deposit with the board such security as it may deem necessary to insure compliance with this part.”

SECTION 7706:

“Interest. All jeopardy determinations including those made under Section 7704, exclusive of penalty, shall bear interest at the rate of one-half of 1 percent per month, or fraction thereof, from the first day of the second calendar month following the close of the monthly period for which the amount or any portion thereof should have been returned until the date of payment.”

SECTION 7726:

“Payments by unlicensed distributors. If any person becomes a distributor without first securing a license, the license tax becomes immediately due and payable on account of all motor vehicle fuel distributions made by him.

If a broker makes sales or otherwise disposes of motor vehicle fuel the aggregate gallonage of which is in excess of his acquisitions of that fuel from distributions with respect to which the tax has been

paid, as disclosed by his inventories and records of purchases, he shall be regarded as an unlicensed distributor of that excess of motor vehicle fuel and shall be subject to the provisions of this article as an unlicensed distributor of that fuel, unless he shall establish that the license tax has been paid with respect to all fuel sold or otherwise disposed of by him.”

SECTION 7727:

“Unlicensed distributor determination; penalty. The board shall forthwith ascertain as best it may the amount of the distributions and shall determine immediately the license tax on the amount, adding to the license tax a penalty of 100 percent of the amount of the tax, and shall give the unlicensed distributor notice of this determination as prescribed by Section 7493. Provisions of Sections 7699 and 7700 shall be applicable with respect to the finality of the determination and the right of the unlicensed distributor to petition for a redetermination.”

SECTION 7728:

“Jeopardy determination collection. The board shall file a copy of this jeopardy determination with the Controller who shall forthwith collect the license tax, penalty and interest due from the unlicensed distributor by seizure and sale of property in the manner prescribed for the collection of a delinquent monthly license tax.”

SECTION 7729:

“Court action. At the request of the Controller the Attorney General shall commence and prosecute to

final determination an action at law to collect the license tax, penalty and interest, or any part thereof, determined against an unlicensed distributor.”

SECTION 7730:

“*Prima facie* evidence. In the suit a copy of the jeopardy determination certified by the secretary of the board or by the Controller, shall be *prima facie* evidence that the unlicensed distributor is indebted to the State in the amount of the license tax, penalties and interest computed as prescribed by Section 7706.”

SECTION 7871:

“Lien, priority of. The license tax, together with all penalties, interest and costs accruing thereupon or with respect thereto, is a lien upon all property of the distributor, attaching at the time of the distribution subject to the license tax. The lien is paramount to all private liens or encumbrances of whatever character and has the effect of an execution duly levied against all property of the distributor. The lien remains until the license tax, together with all penalties, interests and costs accruing thereupon or with respect thereto, is paid or the property sold in payment thereof.”

SECTION 7981:

“*Prima facie* evidence. In any suit brought to enforce the rights of the State under this part a copy of the return filed with the board by the distributor, certified by the secretary of the board, or a copy of the notice of determination prepared by the board and filed with the Controller, certified either by the sec-

retary of the board or the Controller, showing unpaid license taxes, penalties, or interest assessed or determined against any distributor, shall be *prima facie* evidence of the following:

(a) The determination of the license tax, the delinquency thereof, and the amount of the license tax, penalties, and interest due and unpaid to the State.

(b) The indebtedness of the distributor to the State in the amount of the license tax, penalties and interest therein appearing unpaid.

(c) The full compliance by all persons required to perform administrative duties under this part with all the forms of law in relation to the determination and levy of the license tax, penalties and interest.”

SECTION 8251:

“Administration procedure. The board shall enforce the provisions of this part, except insofar as duties and powers are vested in the Controller, and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part. The board may prescribe the extent to which any ruling or regulation shall be applied without retroactive effect.”

SECTION 8252:

“Administrative representatives. The board may employ attorneys, accountants, auditors, investigators, and other expert and clerical assistance necessary to enforce its powers and perform its duties under this part.”

SECTION 8253:

“Examination of licensee records. The board may make such examinations of the records of distributors, producers and brokers and such other investigations as it may deem necessary in carrying out the provisions of this part.”

SECTION 8301:

“Records of distributors, form, etc. Every distributor shall keep an accurate record in such form as the board may prescribe of all of the following:

- (a) All stocks of petroleum products on hand.
- (b) All raw gasoline, gasoline stock, kerosene distillates, casing-head gasoline, and other petroleum products used in, or which may be used in, compounding, blending, or manufacturing motor vehicle fuel.
- (c) The amount of crude oil refined, the gravity of the crude oil refined, and the yield from the crude oil.
- (d) Such other matters relating to transactions in petroleum products as the board may require.”

SECTION 8302:

“Inventory by distributor. Every distributor shall take a physical inventory of the petroleum products on hand at least once each month as prescribed by the board and keep a record of the inventory. If the board or its representatives are dissatisfied with the accuracy of the inventory, they may take a physical inventory of the petroleum products.”

SECTION 8303:

“Producer’s records. Every producer shall keep an accurate record in such form as the board may prescribe of all manufacture, sales, and deliveries of kerosene distillate, kerosene, Diesel fuel, gas oil, stove oil, distillate and any other petroleum product used in, or which may be used in, the blending, compounding, or manufacturing of motor vehicle fuel.”

SECTION 8304:

“Broker’s records. Every broker shall likewise keep an accurate record of all purchases and sales of motor vehicle fuel and petroleum products mentioned in Section 8303, the record to show the vendor and vendee, the quantity purchased and sold, the correct description of the commodity, and the means of transportation from the vendor to the broker and from the broker to his vendee.”

SECTION 8305:

“Inspection of records. All records required by this chapter shall be available at all times for the inspection of the board or its representatives.”

SECTION 8307:

“Producer and brokers’ monthly reports. On or before the fifteenth day of each month, every producer and broker shall file on forms prescribed by the board a report showing such information with respect to the operations of the preceding calendar month as the board may require to carry out the provisions hereof.”

ARGUMENT.

I.

The Findings Made by the Referee Are Amply Supported by the Record and Should Not Be Disturbed.

Appellant is frankly unable to comprehend how the District Judge could have concluded that the findings made by the Referee are not supported by the record. Considering the Referee's finding [Tr. 56, *et seq.*] in light of the record, we note that Mr. Lockwood's petition under Chapter XI was filed on August 30, 1946 [Tr. 10], as set forth in the Referee's Finding I; that the Controller filed a verified proof of claim on Oct. 4, 1946 [Tr. 20-22] as set forth in the Referee's Finding II; that written objections to the aforesaid claim were filed by Mr. Lockwood and Mr. Lynch on October 11, 1946 [Tr. 24-25] as set forth in the Referee's Finding III; that appellant's amended proof of claim was filed on October 17, 1946 [Tr. 26-32] as set forth in the Referee's Finding IV; that Mr. Lockwood and Mr. Lynch filed objections to said amended proof of claim on October 22, 1946 [Tr. 33-35] as set forth in the Referee's Finding V; that Mr. Lockwood was doing business as the Dependable Oil Company during the months of January, May, June, July and September, 1945, and the months of April and May, 1946 [see Lockwood's petition under Chapter XI, Tr. 3-10], as set forth in the Referee's Finding VI; that during the aforesaid months Lockwood was engaged in the business of making sales of motor vehicle fuel (see foregoing analysis of reporter's transcript) as set forth in the Referee's Finding VII; that during the aforesaid months Mr. Lockwood had neither applied for nor secured a distributor's license under the provisions of the California

Motor Vehicle Fuel License Tax Law (see foregoing analysis of reporter's transcript) as set forth in the Referee's Finding VIII; that during the aforesaid months Mr. Lockwood distributed the gallonage disclosed by auditors for the California State Board of Equalization as not having been obtained tax-paid from distributors licensed under the provisions of the California Motor Vehicle Fuel License Tax Law as set forth in the Referee's Finding IX; that the tax imposed by the California Motor Vehicle Fuel License Tax Law upon the distribution of the aforesaid gallonage had at no time been paid, as established by the uncontradicted testimony of the auditors and investigators for the California State Board of Equalization who had made a thorough and extensive check to ascertain the sources from which Mr. Lockwood derived the motor vehicle fuel sold by him, as set forth in the Referee's Finding X; that the amended proof of claim filed by appellant on or about October 17, 1946, is predicated solely upon the distribution of the aforesaid gallonage, as is apparent from the foregoing analysis of the reporter's transcript and as is set forth in the Referee's Finding XI; that none of the amounts claimed in the aforesaid amended proof of claim filed by the Controller on October 17, 1946, have been paid (see the foregoing analysis of reporter's transcript) as set forth in the Referee's Finding XII.

As we have pointed out above in our analysis of the reporter's transcript, it is clear from the testimony of all the witnesses excepting Mr. Lockwood that Mr. Lockwood sold motor vehicle fuel in gallonage exceeding the amount he purchased tax-paid from licensed distributors. It is additionally clear that Mr. Lockwood had been engaged in black market operations during the taxable pe-

riods in question and that Mr. Lockwood himself was unable to account for the sources of the fuel actually sold by him as established by audit of his vendees' records. The only testimony offered in support of the objections filed by Mr. Lockwood and the Receiver in the then pending Chapter XI proceedings was Mr. Lockwood's monosyllabic denial [Tr. 236] that he had ever purchased gasoline from a company other than a licensed distributor and his monosyllabic affirmance [Tr. 238] that all the gasoline he had purchased for distribution during the calendar years 1945 and 1946 had been purchased tax-paid. *It is to be noted that Mr. Lockwood did not deny that he had been engaged in black market activities.*

It is apparent, accordingly, that the conflicting evidence before the Referee consisted on the one hand solely of Mr. Lockwood's two-worded testimony that he had purchased only tax-paid gasoline from licensed distributors and, on the other hand, of the balance of the entire record. The Referee had Mr. Lockwood before him and had the opportunity to evaluate Mr. Lockwood's credibility as well as the credibility of all the other witnesses.

As we have stated above, we are frankly unable to comprehend how the District Judge could have held that the Referee's Findings are not supported by the record. General Order 47 requires a District Judge to accept a Referee's Findings of Fact unless they are clearly erroneous, and a similar provision is contained in Rule 53(e)(2) of the Federal Rules of Civil Procedure. Additionally, the courts have long held that the deliberate judgment of a Referee who saw the witnesses and heard their stories at length must be accepted unless clearly erroneous, inasmuch as the Referee is in a much better position than either the District Court or the Circuit Court

to pass on the credibility of witnesses. As Judge Healy of this Court stated in *Powell et ux. v. Wumkes*, 142 F. 2d 4, 6:

“Order 47 is not too happily phrased, but considering its provisions in their entirety it would seem that they do not shackle the judge to the extent that an appellate court is circumscribed by Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A., following section 723c. The judge has large supervisory powers. Where he confines himself to a review of the record made before the referee *he is not permitted to try factual questions de novo*, that is to say, *he is not at liberty to reject the findings of the referee merely because he disagrees with the latter as to the credibility of witnesses or the weight to be accorded conflicting evidence*. But unlike an appellate court the judge is empowered, in appropriate circumstances, to receive further evidence; and on the basis of the enlarged record he may modify or make findings, or may recommit the matter for further hearing by the referee.” (Emphasis added.)

Judge Wilbur, formerly of this circuit, in *Weisstein Bros. & Survol v. Laugharn*, 84 F. 2d 419, 420, recognized the existence of,

“ . . . the familiar rule that where facts are litigated before the referee, and where the witnesses appeared before him, and a decision upon the controverted facts had been made by him, the court will not ordinarily be justified in reversing the finding of the referee as to the controverted facts. In re Gordon & Gelberg (C. C. A.), 69 F. (2d) 81, 83; Rasmussen v. Gresly (C. C. A.), 77 F. (2d) 252; Renington on Bankruptcy (4th Ed.), vol. 8, 3669, p. 41; Ingram v. Lehr (C. C. A.), 41 F. (2d) 169, 170.”

The Honorable Leon R. Yankwich, District Judge, quoted the foregoing portion of Judge Wilbur's decision in the *Weisstein Bros.* case, *supra*, in *In re Alberti*, 41 Fed. Supp. 380, 381, and concluded that:

"This means that, while, *on conflicting testimony, we must follow the findings of the referee* (or the commissioner), when there is no conflict of testimony, or when the testimony upon which the decision is based is not legally entitled to the effect which the commissioner has given to it, there is no evidence whatsoever to sustain the commissioner." (Emphasis added.)

The decision of this Court in *Ott v. Thurston et al.*, 76 F. 2d 368, 369, is also pertinent:

"Another error stressed by appellant is that the judge of the District Court erred in holding that where the evidence introduced before the referee in bankruptcy was conflicting, he was not at liberty to disregard the referee's findings. In that connection, the District Court stated in its opinion: 'The evidence was at least conflicting, the District Court is not at liberty to disregard the Referee's finding for they find sufficient support in the evidence.' *The court was here expressing the general rule of practice on review or appeal.*

"It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court.' *In re Stout*, 109 F. 794 (D. C. Mo.), See, also, *In re Noyes Bros.*, 127 F. 286 (C. C. A. 1)." (Emphasis added.)

In *McDonald v. First Nat. Bank of Attleboro*, 70 F. 2d 69, 71, Judge Morton of the First Circuit, in reversing a district judge who had reversed a referee, stated:

“A referee’s findings ‘have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part.’ [Citing cases.] Upon a careful examination of the record, we are unable to agree with the District Judge. The critical findings of the referee do not appear to us to be clearly wrong. Without undertaking to analyze the evidence and findings in detail, we think the referee’s conclusion . . . was by no means unreasonable. . . .”

In *Morris Plan Industrial Bank v. Henderson*, 131 F. 2d 975, the Court of Appeals for the Second Circuit had occasion to consider an appeal from an order of the District Court reversing the order of a referee granting a bankrupt’s discharge. The first question considered by the Circuit Court was the extent to which they should review the proceedings below, and Judge Learned Hand in writing the decision disposed of this point as follows:

“The first question is as to the extent of our review: whether the case comes before us as it came before the district judge, or whether he had a larger latitude in reviewing the referee’s findings than we have. General Order 47, 11 U. S. C. A. following section 53, requires the judge to ‘accept his [the referee’s] findings of fact unless clearly erroneous.’ These are the same words as those used in Rule 53 (e) (2), 28 U. S. C. A. following section 723c, and substantially the same as those in Rule 52(a) which requires us not ‘to set aside’ the finding of a

judge unless it too is 'clearly erroneous.' It is true that logically a distinction can be drawn between holding a referee's finding to be 'clearly erroneous' and holding a judge's finding that a referee's finding is 'clearly erroneous' to be 'clearly erroneous.' Possibly the Seventh Circuit meant to make that distinction in a case that arose under General Order 47 before it was amended. *In re Duvall*, 103 F. 2d 653. We should regret, however, to be compelled now to introduce such refinements into the solution of what is after all only a practical problem. Everyone forms his conclusions from testimony, not only from the words which he hears the witnesses utter but from their appearance when they utter them; and the added weight to be attached to a referee's finding, or to a judge's (if he sees the witnesses) depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude, the referee's conclusion ought to prevail because we cannot appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the judge's as indeed it does ours; *In re Kearney*, 2 Cir., 116 F. 2d 899; but we have again and again held that except in plain cases he should accept the referee's findings. [Citing cases.] We therefore hold that the question is the same in this court as it was in the district court."

See, also:

Kowalsky v. American Employers Ins. Co., 90 F. 2d 476;

In re Gallis, 115 F. 2d 626, cert. den. 312 U. S. 704, 85 L. Ed. 1137, 61 S. Ct. 808.

II.

The Record Herein Clearly Establishes the Tax Liability Upon Which Appellant's Proof of Claim Is Predicated.

Although it is, of course, the well established rule that verified proofs of claim are *prima facie* correct and that an objecting party has the burden of going forward with sufficient evidence or testimony to overcome the *prima facie* correctness of a properly verified claim, and although appellant submits that there is nothing in the record herein sufficient to support the objections filed by Mr. Lockwood and Mr. Lynch, the then Receiver in Chapter XI proceedings, nor sufficient to have justified a ruling that the *prima facie* validity of appellant's claim had been overcome and that appellant had the burden of going forward and proving his claim (as the Referee below held), we nevertheless desire to direct the Court's attention to the fact that the record herein fully establishes the tax liability upon which appellant's proof of claim is predicated.

Both the California and the Federal Courts, including the United States Supreme Court, have held in tax refund suits that *even where a tax assessment is predicated upon an audit made without regard for a taxpayer's books and records*, the taxpayer nevertheless has the burden of showing that the amount of the assessment is not due and owing under the taxing statute.

United States v. Jefferson Electric Co., 291 U. S. 386, 402, 54 S. Ct. 443, 449, 78 L. Ed. 859;

Lewis v. Reynolds, 284 U. S. 281, 283, 52 S. Ct. 145, 146, 76 L. Ed. 293;

Clafin v. Godfrey, 21 Pick. 1, 6;

Van Antwerp v. United States (C. C. A. 9), 92 F. 2d 871, 873-874;

People v. Schwartz, 31 Cal. 2d 59;

People v. Mahoney, 13 Cal. 2d 729;

Maganini v. Quinn, 99 A. C. A. 1, 5, *et seq.*
(Hearing denied by the California Supreme Court October 2, 1950);

Pacific Fruit Express Co. v. McColgan, 67 Cal. App. 2d 93, 96.

The decision of the Court of Appeals for the Sixth Circuit in *Rogers v. Commissioner of Internal Revenue*, 111 F. 2d 987, 988-989, in considering an appeal from a decision of the former Board of Tax Appeals (presently the United States Tax Court) affirmed a decision of the Board of Tax Appeals in upholding deficiency assessments levied by the Commissioner of Internal Revenue sets forth the rule requiring the taxpayer to come forward with a reasonable explanation:

“We think the Board did not err. . . . The finding of the Commissioner is *prima facie* correct, and petitioners have the burden of proving what part of the amount determined to be a deficiency is not due. *Welch v. Helvering*, 290 U. S. 111, 54 S. Ct. 8, 78 L. Ed. 212; *United States v. Peabody Co.*, 6 Cir., 104 F. 2d 267; *Commissioner v. Volunteer State Life Ins. Co.*, 6 Cir., 110 F. 2d 879, decided March 12, 1940. Petitioners have not sustained this burden. The records of the company were loosely kept, in that Rogers instructed the bookkeeper what entries to make. Petitioners kept no personal records. Evidence as to their income consists of sketch memoranda, and information emanating from the uncertain memory of

Charles A. Rogers. Rogers' testimony on the point is confused and evasive. He made references to memoranda which were not produced, and stated that he did not know where they were. It was Rogers who directed that [a certain . . .] journal entry . . . be made. Rogers at the time of the hearing was serving sentence for conviction of embezzlement of city funds. . . . The Board's finding is a determination of a question of fact, and if supported by the record, should be affirmed unless clearly erroneous. [Citing cases.]”

See, also:

McClure v. United States, 48 Fed. Supp. 531;

Guaranty Trust Co. v. United States, 44 Fed. Supp. 417.

As the Federal Courts have often stated, the rationale behind placing the burden upon the taxpayer to come forward to show a tax assessment is not due and owing is that the taxpayer, being the most intimately acquainted with the facts, should be able to produce them. In the instant case, the parties objecting to appellant's claim, in the proceedings had before the Referee, failed to come forward with any explanation sufficient to even infer a legitimate tax-paid source for the gallonage which the uncontroverted testimony establishes was sold by Mr. Lockwood. We are unable to comprehend how the District Judge could have ignored the fact, as established by the record, that Mr. Lockwood's purchases and sales

were cross-checked to the records of his vendors and vendees and that Mr. Lockwood failed to come forth with even one additional possible source of tax-paid motor vehicle fuel. (See Section 7726 of the California Motor Vehicle Fuel License Tax Law, *supra*.)

We will not burden the Court with a detailed review of the facts in light of the pertinent provisions of the California Motor Vehicle Fuel License Tax Law set forth above. Briefly summed up, however, it is clear that Mr. Lockwood distributed, within the meaning of Section 7305 of the Motor Vehicle Fuel License Tax Law the gallonage of motor vehicle fuel (as defined by Section 7304 of the Motor Vehicle Fuel License Tax Law) in the gallonages set forth in the notices of determination duly issued by the Board of Equalization and mailed to Mr. Lockwood as the taxing statute requires. Reference to the statutory provisions will disclose that the tax, penalties and interest were computed upon the aforesaid gallonages as provided by the statute and as set forth in the copies of the notices of determination attached to appellant's proof of claim as Exhibits "B," "C," "D" and "E." Reference to Section 7871 of the Motor Vehicle Fuel License Tax Law, as it read during the taxable periods involved, will disclose that a lien upon all of Mr. Lockwood's property in the amount of tax, penalties and interest attributable to his monthly distribution of the gallonages involved attached to all his property at the time of said distributions.

III.

Mr. Lockwood Having Filed the Only Petition for Review of the Referee's Order Allowing Appellant's Claim in Full, and Lockwood Having Abandoned Said Petition, the District Court Erred in Permitting Others to Review the Referee's Order and Others Should Not Be Permitted to Prosecute This Appeal.

As we have pointed out in our Preliminary Jurisdictional Statement and as is disclosed by the full record herein, although Mr. Lockwood and E. A. Lynch, as Receiver under Chapter XI, had filed objections to appellant's claim, Mr. Lynch was instructed not to petition for review of the Referee's Order and the only petition for review filed was the one filed by Mr. Lockwood. Mr. Lynch did not seek a review of the Referee's Order instructing him not to file a petition for review of the Order allowing appellant's claim. The record is additionally clear, as we have attempted to point out above, that after Mr. Lockwood filed his petition for review neither he nor his attorneys participated therein thereafter. To the contrary, Mr. Lockwood failed to take any steps to have a reporter's transcript prepared, and when, after more than six months had elapsed, counsel for appellant secured an order to show cause directed to Mr. Lockwood ordering him to appear and show cause why the Referee should not prepare his certificate on review without a reporter's transcript or a narrative statement of the evidence, neither Mr. Lockwood nor his attorney appeared on the return date. As is apparent from the affidavit of Harry A. Pines, Esq. [Tr. 65-71], one of the attorneys for E. A. Lynch, presently Trustee in Bankruptcy, and the Notice of Motion appearing at page

62 of the transcript herein, the attorneys for the trustee, in effect, took over Mr. Lockwood's petition for review through an Order of District Judge Harrison granting the attorneys permission to participate in Mr. Lockwood's petition for review as *amicus curiae*. It is also clear from the record that on February 28, 1949, Mr. Pines, as attorney for Mr. Lynch, Trustee in Bankruptcy herein, made a motion before District Judge Beaumont for an Order permitting the trustee to add a reporter's transcript to the record on Mr. Lockwood's petition for review, and it is to be noted that Mr. Pines, as attorney for Mr. Lynch, argued the motion, representing to the Court that the reporter's transcript would be furnished at the expense of the Ben Hur Refining Company, a creditor of the bankrupt estate. It is obvious that the Ben Hur Refining Company was willing to finance the preparation of the transcript inasmuch as the disallowance of appellant's lien claim would leave assets otherwise going toward satisfaction of appellant's claim available for payment of the Ben Hur Refining Company claim. The trustee's motion was duly granted by Judge Beaumont and the transcript was ordered prepared specifically at the expense of said Ben Hur Refining Company.

It is elementary that a District Judge can entertain a petition for review of a Referee's Order only if it is filed by someone having standing to review. (Remington on Bankruptcy (5th Ed.), Vol. 8, p. 7.)

Although it is true that all parties aggrieved by an Order entered by a Referee in Bankruptcy have standing to petition for review, it is equally well established that such aggrieved parties must either file their own petitions for review if they have been represented in the

particular proceeding or controversy in which the Order sought to be reviewed was entered; or, if they have not been represented in that particular proceeding or controversy, they must apply for leave to intervene for the purpose of filing their petitions for review. (Remington on Bankruptcy (5th Ed.), Vol. 8, p. 7, *supra*.)

It is clear from the record herein that E. A. Lynch, either as former Receiver under Chapter XI or as present Trustee in Bankruptcy of the estate of Mr. Lockwood, did not file a petition for review, and it would appear to necessarily follow from the foregoing that the trustee in bankruptcy herein had no standing before the District Judge, nor does he have any standing here. Even if it be argued that the Ben Hur Refining Company and the Trustee herein still had some standing after Mr. Lockwood abandoned his petition for review because they had relied on Mr. Lockwood's petition and had expected to benefit from his review, that argument is untenable because it is well established that not only may standing to petition for review be lost by failure to so do but also that a party expecting to benefit from a review taken by another cannot be substituted for the petitioner and permitted to prosecute his review when the latter has abandoned or wishes to abandon it. (Remington on Bankruptcy (5th Ed.), Vol. 8, pp. 7-8.)

In re Bender Body Co., 139 F. 2d 128;

In re Pramer, 131 F. 2d 733, 735.

Conclusion.

It is respectfully submitted that the Honorable Harry C. Westover, District Judge, erred in holding that the record herein does not support the findings made by the Referee, and, furthermore, that the Findings of Fact, Conclusions of Law and Order made by the Honorable Harry C. Westover are in and of themselves entirely unsupported by the record herein. It is further submitted that the Order of the District Judge disregarded entirely the well established principles relating to the manner in which disputed tax liabilities are finally determined.

Although not material to a determination of the propriety of the Referee's Order allowing appellant's claim in full, it is submitted that the Orders of the District Court permitting others than the petitioner for review to prosecute a petition after abandonment by the petitioner were improper, finding no sanction in statute, rule or decision and will set a dangerous precedent if not reversed by this Court.

The Order of District Judge Westover should be reversed, the Order of the Referee allowing appellant's claim in full should be reinstated.

Respectfully submitted,

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No. 12782.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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PAUL F. O'BRIEN,

CLERK

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No. 12782.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

Although replete with reference to matters extraneous to the basis of the jurisdiction of the District Court and this Court, Appellant's "Preliminary Jurisdictional Statement" covering pages 1 to 6, inclusive, of Appellant's Opening Brief, fails to include transcript reference to the pleadings in this proceeding which would reveal that prior to the hearing on review by the District Court (1) the Chapter XI proceedings terminated, (2) the debtor was adjudicated a bankrupt, and (3) E. A. Lynch qualified as trustee in bankruptcy of the said Arlie R. Lockwood as a bankrupt.

Obviously the failure of Appellant to bring up to this court a sufficient transcript covering essential jurisdictional elements is a matter of concern to the Appellant and not to the Appellee.

The very title of this case on appeal (a matter also solely in the control of Appellant) fails to reveal that E. A. Lynch as trustee in bankruptcy of Arlie R. Lockwood, Bankrupt, is the appellee herein. Notice of appeal in this case was served upon counsel for E. A. Lynch as trustee in bankruptcy, although the transcript merely refers to an affidavit of service by mail attached to the notice of appeal, without indicating when and upon whom such service was effected. [Tr. p. 86.] The undertaking for costs on appeal filed by Appellants is expressly for the benefit of E. A. Lynch, trustee in bankruptcy for Arlie R. Lockwood, the Appellee herein. [Tr. pp. 86 to 89.] We are uncertain whether the *Comptroller* of the State of California referred to in said undertaking is one and the same party as the *Controller* of the State of California who filed the notice of appeal herein.

II.

Specification of Errors.

Appellant has chosen to ignore Rule 20(d) of the Rules of this court which requires an appellant's opening brief on appeal to include a "*specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.*" Failure of Appellant to comply with the rule, particularly with respect to the requirement of Rule 20(d) that appellant in such specifications particularly state *wherein* the findings of fact and conclusions of law are alleged to be erroneous, places an unnecessarily difficult burden upon Appellee herein in determining the true nature of Appellant's alleged grievances.

It appears from *Peck et al. v. Shell Oil Co., Inc.*, 142 F. 2d 141, at page 143, that this court has held that a mere reference in the brief to a page in the printed transcript where appellant's statement of points on appeal appears is not sufficient to satisfy Rule 20(d). On page 6 of his brief, Appellant, by way of his "Preliminary Jurisdictional Statement," refers to the filing of a "Statement of Points Upon Which Appellant Intends to Rely" [which statement is indicated as appearing at pages 323 to 325 of the transcript]. The statement of points referred to alleges the findings and conclusions of the District Judge to be error, but fails, as required by Rule 20(d) to "state as *particularly* as may be *wherein* the findings of fact and conclusions of law are alleged to be erroneous."

This court, in the case of *Simons v. Davidson Brick Co.*, 106 F. 2d 518, at page 521, declared:

"Our rule should be followed. It is necessary as far as possible to sharply define the contentions of the ap-

pellant, and to avoid the difficulties arising from haphazard contentions upon questions of law and fact that may or may not be germane to the questions raised on appeal."

That no special immunity respecting compliance with court rules exists in favor of a governmental body is evident from the fact that this court in the cases of *United States v. Shingle*, 91 F. 2d 85 and *United States v. John II Estate*, 91 F. 2d 93, disregarded assigned errors not specified in the brief of the appellant *United States of America*.

A statement of points relied on which is violative of court rules presents no question for review by the court of appeals.

Butler v. U. S. (C. C. A. 8), 108 F. 2d 27;

Cohen v. U. S. (C. C. A. 4), 142 F. 2d 861;

Mathewson v. First Trust Co. (C. C. A. 8), 100 F. 2d 121;

Lohman v. Stockyards Co. (C. C. A. 8), 243 Fed. 517;

City of Goldfield v. Roger (C. C. A. 8), 249 Fed. 39.

III.

Statement of the Case.

Appellant's "Statement of the Case" consumes 16 pages of Appellant's brief, to-wit: pages 7 to 23, inclusive, and consists of an argumentative and self-serving narration of the evidence. By no stretch of the imagination however, can Appellant's "Statement of the Case" be deemed to constitute a compliance with Rule 20(c) of this court which calls for "a *concise* abstract or statement of the case presenting *succinctly* the *questions involved* and the manner in which they are raised."

IV.

Questions on Appeal.

The absence from Appellant's brief of both the specification of errors and a statement of the questions involved, confronts Appellee with the alternative, either to ignore completely the unspecified arguments contained in Appellant's brief, or to "search" such brief and engage in argument which may become surplusage if this court refuses to consider the arguments as to unspecified error.

Cyc. Fed. Proc. (2nd Ed.), Volume 12, Section 6046, page 21:

"If there are any errors assigned and argued, which are not presented, or not sufficiently presented, for review upon the record, appellee should in his brief call attention to the fact and urge that they are not open for consideration. Appellee cannot go beyond supporting the decree or judgment and opposing the assignments of error."

Although it may be superfluous to do so, we have analyzed the arguments contained in Appellant's brief, and believe that the questions attempted to be raised by Appellant may be defined as follows:

1. Where, by state statute, a tax is imposed upon the distribution of motor vehicle fuel (such tax being imposed upon one distribution only irrespective of the number of transactions involving such fuel), was it error for the District Court to hold that the Controller of the State of California had failed by his proof to sustain a tax lien claim over the objections of the bankrupt (then a

Chapter XI debtor) and his receiver, the evidence disclosing merely that the bankrupt, a licensed broker under the California Motor Vehicle Fuel License Tax Act, was in possession of invoices indicating sales of gasoline in excess of the monthly sales reported by him to the Board of Equalization, and that such bankrupt had purchased all gasoline handled by him from licensed distributors who had previously paid the motor vehicle fuel tax upon the initial distribution of such gasoline?

2. Was the District Court bound by the referee's finding of alleged fact that the bankrupt had "distributed" a specified volume of gasoline, such finding actually constituting a conclusion of law supported only by evidence of unreported sales not linked to tax unpaid gasoline?

3. Does the rule in tax refund and similar causes which places the burden of proof upon the taxpayer apply to proceedings in bankruptcy wherein a receiver or trustee in bankruptcy has filed objections to the claim of a tax creditor seeking to establish a lien priority?

4. Where a petition for review to the District Court from an order of the referee overruling objections to a creditor's claim is filed by a debtor in possession in Chapter XI proceedings, and where during the pendency of such review, the Chapter XI proceedings are dismissed and the debtor is adjudicated a bankrupt, does the trustee in bankruptcy for such bankrupt succeed to the rights of the debtor in the then pending review proceedings?

V.

**Pertinent Provisions of the California Motor Vehicle
Fuel License Tax Law.**

Under the foregoing heading, Appellant has printed at length various sections of the *Revenue and Taxation Code* of the State of California. (App. Op. Br. pp. 24-35, incl.) Unfortunately, Appellant has given little regard to the dates of enactment or amendment of the statutory sections appearing in Appellant's brief, many of such sections and amendments thereto *not even having been enacted until after the critical dates involved in this appeal, to-wit:* The months of January, May, June, July and September of 1945, and the months of April and May of 1946. [Tr. p. 28.]

Section 7351 of the *Revenue and Taxation Code* as it appears on page 24 of Appellant's brief had been amended June 23, 1947, the amendment not becoming operative until July 1, 1947. (Stats. Ex. Sess. 1947, Ch. 11, Sec. 29.) As it read prior to its amendment it made no reference to a rate of \$0.04½ per gallon.

Sections 7303, 7493, 7700, 7729, 7730, 8251, 8252, and 8253 of the *Revenue and Taxation Code* quoted by Appellant appear to have no pertinency to any of the issues on this appeal.

Subdivision (e) of Section 7305 appearing on page 25 of Appellant's brief was added by the Statutes of 1948, Chapter 36, Section 1, and did not become effective until April 29, 1948.

Section 7353 on page 27 of Appellant's brief represents an amendment adopted by Statutes 1945, Chapter 531, Section 2, which amendment was not operative until July 1, 1945. The amendment substituted the word "determination" for the word "assessment."

Section 7401 as printed by Appellant on pages 27 and 28 of Appellant's brief incorporates amendments adopted by Statutes 1945, Chapter 531, Section 3; Statutes Extraordinary Session 1947, Chapter 15, Section 1; and Statutes 1949, Chapter 711, Section 1. These amendments became effective on July 1, 1945, July 10, 1947, and June 18, 1949, respectively. Since the section lacks relevancy to the issues herein, we do not undertake to point out the effect of the amendments.

The second paragraph of Section 7726 was not enacted until 1947. (Stats. 1947, Ch. 1564, Sec. 1.)

While we would refuse to believe that Appellant was guilty of intentional misrepresentation of the foregoing statutory provisions, we believe that the carelessness displayed is characteristic of Appellant's entire brief.

ARGUMENT.

I.

The Findings of the Referee Are Not Supported by the Record and Were Properly Set Aside by the District Court.

The critical finding of the referee consists of his finding No. IX to the effect that during certain designated months in 1945 and 1946 the bankrupt had "*distributed*" a specified volume of motor vehicle fuel upon which the 3¢ per gallon tax had not been paid to the State of California. [Tr. pp. 59, 60.]

Upon the same evidence, the District Court found that certain sales invoices discovered among the records of the bankrupt indicate sales of gasoline in the amount specified in the referee's finding No. IX, but that there was an absence of evidence that the motor vehicle fuel sold by the bankrupt during such periods of time was not purchased from licensed manufacturers or distributors who had already paid the motor vehicle fuel tax on such fuel. [Tr. pp. 82-83.] Whether "*distribution*" within the meaning of *Revenue and Taxation Code, Section 7305*, had taken place represents a conclusion of *law* that could be reached only upon findings of fact that one or more of the several acts constituting "*distribution*" within the meaning of the statute had been committed by the bankrupt. The referee did not, and could not under the evidence find that the bankrupt had *refined, manufactured, produced, blended, or compounded* motor vehicle fuel other than 792 gallons of kerosene blended with gasoline by mistake. [Tr. p. 83.]

In the absence of such findings, the conclusion that “distribution” had taken place could not be drawn from the evidence before the court.

Nor is there any evidence in the record which can support that portion of referee’s finding No. IX in which the referee finds that the motor vehicle fuel so “distributed” was fuel with respect to which the motor vehicle fuel tax had not been paid to the State of California.

The bankrupt affirmatively testified that at no time during 1945 and 1946 did he purchase any gasoline from a concern not licensed as a distributor in the State of California. [Tr. p. 236.] He specifically testified to the names of the concerns from which he purchased such gasoline. [Tr. pp. 236-237.] He testified that the gasoline sold by him during the calendar years 1945 and 1946 was all tax-paid gasoline. [Tr. p. 238.] He also testified that the price which he paid for gasoline included a 3¢ state tax and a 1½¢ federal tax. [Tr. p. 239.]

The foregoing evidence stands uncontradicted. In fact, it is *convincingly corroborated by evidence introduced by Appellant*. The Supervising Auditor of the Board of Equalization testified that despite intensive investigation, the Board *was unable to find a single instance in which the bankrupt had received gasoline upon which the tax had not been paid*. [Tr. pp. 187 and 188.]

It is clear that Appellant’s case required proof of the sale of gasoline upon which a tax had previously not been paid, and mere evidence of sales of gasoline without attributing them to a source other than a licensed distribu-

tor omits the most essential link in the chain of proof which would classify such gasoline as being subject to the motor vehicle fuel tax.

Appellant refers in his brief to the fact that the bankrupt did not deny being involved in black market operations. The hearing on Appellant's claim did not constitute a prosecution against the bankrupt for black market operations, nor has Appellant established that, if proved to have been engaged in black market operations, a motor vehicle fuel tax would have been incurred by the bankrupt. The explanation which the bankrupt gave to six auditors and investigators of the Board of Equalization was that he was, in his own opinion, the leading black market operator of gasoline in southern California. [Tr. pp. 228-230.] The bankrupt's very explanation belied the taxability sought to be established by Appellant. When the bankrupt made his explanation to the representatives of the Board of Equalization, he had in his possession approximately \$30,000.00 worth of illegally procured O.P.A. ration books, ration stamps, and ration coupons, which he stated had become worthless as a result of the end of the war with Japan. He explained that he was engaged in the business of selling gasoline to service stations without coupons, and that he used the illegal coupons and ration checks as the means of covering such transactions. His procedure was to execute false sales invoices in order to justify his possession of the coupons and ration checks. [Tr. p. 229.] Reprehensible as this conduct may be, it may have been occasion for proper action by United

States officials for the violation of the law, but is no occasion for unjust enrichment to the State of California by way of motor vehicle fuel taxes which had not been incurred.

Appellant, faced with the evidence that the gasoline handled by the bankrupt was all tax paid gasoline, introduced testimony concerning four possible sources from which tax unpaid gasoline could have been procured during World War II. [Tr. pp. 226-228.] There was no evidence introduced linking the bankrupt to any one of the four such sources. In order to reach the conclusion which was reached by the referee, it is necessary to indulge in the speculation and conjecture that the bankrupt had engaged in one or more of the illicit operations which were suggested by the testimony of Appellant's witness. In his memorandum opinion, the District Judge cited several cases which support the hornbook principle that a finding of fact cannot be predicated upon guesswork, surmise or conjecture. [Tr. pp. 77-79.]

Were we confronted by an absence of any evidence at all on the subject matter, it would be presumed that the law had been complied with by the usual and customary payment of the fuel tax by the refiner rather than violated by the failure of the refiner to pay the same. The referee's finding not only lacks any support in the record, but it is contradicted by the only evidence upon the subject, including the evidence introduced by the tax claimant.

II.

The District Court Was Not Bound by the Conclusions of Law of the Referee or by the Referee's Unsupported Findings of Fact.

We borrow a quotation found on page 40 of Appellant's opening brief taken from the case of *In re Alberti*, 41 Fed. Supp. 380, 381, save only that we place the emphasis where we believe it properly belongs, to-wit:

"This means that, while, on conflicting testimony, we must follow the findings of the referee (or the commissioner) *when there is no conflict of testimony, or when the testimony upon which the decision is based is not legally entitled to the effect which the commissioner has given to it, there is no evidence whatsoever to sustain the commissioner.*" (Emphasis ours.)

When the findings of the referee in bankruptcy are based solely upon an inference, drawn from uncontradicted facts, the reasonableness of the inference may be as fairly determined by the court as by the referee, and no presumption in favor of the referee's findings exists which binds the independent judgment of the court.

Stewart v. Ganey (C. C. A. 5), 116 F. 2d 1010;
O'Brien-Manuel Federal Appellate Procedure (3rd Ed.), p. 122.

In the instant case the referee actually rendered no findings of fact upon the subject matter of "distribution." To have done so would have required the receipt of evidence and determinations of fact covering acts sufficient to constitute distribution within the definition of Section 7305 of the *Revenue and Taxation Code*. Appellant's argument that the District Court was bound by the referee's findings of fact is irrelevant inasmuch as the ref-

eree's crucial finding in this case was merely an unsupported conclusion of law clothed in the formal robe of a finding of fact.

Where a referee's purported findings of fact are in effect conclusions of law, the District Court need not accept them on review.

Bank of America v. Lerer (C. C. A. 9), 77 F. 2d 758.

III.

The Burden of Proof to Support Its Tax Lien Claim Rested Upon the Claimant.

Appellant seeks to escape the effect of the inadequacy of the record to support his case by urging application of a rule appropriate to tax refund and similar cases which fixes the burden upon the taxpayer to establish that a tax assessment (even though arbitrary) is not due and owing under the taxing statute.

Section 57n of the *Bankruptcy Act* provides that all claims including those of the United States or of any state are provable in the manner provided by such section.

Government claims for taxes arising prior to bankruptcy are on a footing of equality with all other provable debts, as far as the manner and time of proof is concerned.

Collier on Bankruptcy (14th Ed.), Vol. 3, Sec. 63.26, p. 1869.

While a state may provide procedural rules affording special treatment for determination of state taxes in the state courts, such as Sections 7730 and 7981 of the *Revenue and Taxation Code*, rules of procedure applicable to suits in a state court do not and should not affect the

established procedure of a court of bankruptcy in the determination of creditors entitled to participation in a bankruptcy estate.

American Surety Co. of N. Y. v. Sampsell (C. C. A. 9), 148 F. 2d 986, 987.

Although federal district courts under the *Conformity Act* are required to adapt their procedure to the practice existing in the state courts where the district court is held, the *Conformity Act* does not apply to bankruptcy procedure.

In the case of *In re Paleis*, 296 Fed. 403, 406 (cert. den. 264 U. S. 591, 68 L. Ed. 865, 44 S. Ct. 404), the Second Circuit said:

“The claim put forward is based on section 914 of the Revised Statutes otherwise known as the Conformity Act [Comp. St. No. 1537], which reads as follows: ‘The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the * * * District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such * * * District Courts are held, any rule of court to the contrary notwithstanding.’

“But that statute very clearly has no application to the practice, pleadings, forms, and modes of proceeding in bankruptcy. The statute expressly declares that it applies ‘in civil causes, other than equity and admiralty causes.’ And bankruptcy proceedings are purely equitable in character, and within the limits of the Bankruptcy Act [Comp. St. Nos. 9585-9656], and the special rules of practice prescribed by the Supreme

Court of the United States, are administered in accordance with the principles and practice of equity. They are not, therefore, subject to the Conformity Act."

See, also, *Remington on Bankruptcy* (5th Ed., 1950), Volume 1, Sec. 32, at page 67, to the effect that:

"A further cogent reason why bankruptcy proceedings never have been required to conform to practice of the state wherein the court sits is to be found in the interstate and specialized character of such proceedings, long recognized as requiring uniformity in practice and procedure throughout the nation."

A court of bankruptcy is a court of equity. Its function is to supervise and control the fair and equitable administration of an estate in bankruptcy, even where in the exercise of such power it is compelled to ignore a duly enforceable judgment of a state court.

Pepper v. Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281.

In the case of a general unsecured claim which is verified and which sets forth all of the facts necessary to establish and pass upon the validity of such claim, the claim is said to have *prima facie* validity, and the burden is upon the objecting party to introduce evidence to rebut the *prima facie* case established by the claim. Once this has been accomplished, the burden passes entirely to the claimant to sustain his claim.

Alexander v. Theleman, 69 F. 2d 610, 611 (C. C. A. 10);

In re Youroveta Home etc. Co., 297 Fed. 723 (C. C. A. 2).

The claim of the State of California in this case however, was not entitled even to the *prima facie* validity usually afforded an ordinary claim in bankruptcy. In the first place, both the claim and amended claim of the Appellant herein are based upon *information and belief*. [Tr. pp. 20, 26.] The reason for affording evidentiary effect to a properly sworn proof of claim is that the proof of claim is in the nature of a deposition, and therefore has evidentiary effect. In fact, former *General Order XXI* referred to a proof of claim as a "deposition to prove claims."

In re United Wireless Telegraph Co., 201 Fed. 445;
In re Century Silk Mills, 296 Fed. 713.

An affidavit or a deposition which is based upon information and belief is the same as no affidavit or deposition at all.

Bank of America v. Williams, 89 Cal. App. 2d 21,
200 P. 2d 151;

Riviello v. Journeyman Barbers, etc., 88 Cal. App.
2d 499, 199 P. 2d 400;

Gay v. Torrance, 145 Cal. 144, 78 Pac. 540;

In re United Wireless Telegraph Co., 201 Fed. 445,
448.

Where the proof of claim is insufficient, the claim may be disallowed, or the referee may order proper and legitimate inquiry into the fairness and legality of the claim. It was appropriate therefor, that the referee under these circumstances, fix the burden of proof upon the claimant.

Orr v. Park (C. C. A. 5), 183 Fed. 683.

Even had the claim been properly filed, the fact that it sought *priority* allowance, and, the establishment of a *lien*, deprived the claimant of the benefits of a *prima facie* case from the mere proof of claim, such treatment not being afforded to priority claims.

Weekley v. Oil Well Supply Co. (C. C. A. 4), 12 F. 2d 539;

Bolling v. Bowen (C. C. A. 4), 118 F. 2d 59;

Collier on Bankruptcy (14th Ed.), Vol. 3, Sec. 57.18, p. 233.

Appellant correctly ascribes the rationale behind placing the burden upon the taxpayer to overthrow the tax assessment in the tax refund type of case as being the intimate acquaintanceship of the taxpayer with the facts. It is appropriate that the taxpayer be estopped by his conduct if he fails to satisfactorily explain any discrepancy in his books.

The estoppel however would not apply to a receiver or bankruptcy trustee who stands in the shoes of third parties, the creditors of the estate.

Thus the Court of Appeals for the Sixth Circuit in the case of *In re Gustav Shaeffer Co.*, 103 F. 2d 237 at page 241, said:

“This provision is found in the act of July 1, 1898, 30 Stat. 563, and courts have ruled with unanimity that the Bankruptcy Court is not irrevocably bound by an irrebutable presumption of the validity and correctness of the assessment made by the taxing

authorities. The language of the statute is plain and it is the duty of the court to hear and determine whether the value at which the property of the bankrupt was assessed was proper and correct according to local taxing statutes.

* * * * *

“There was no priority between the trustee and the bankrupt. The former acquired title to the property by operation of law *and the doctrine of estoppel is inapplicable.*

“Under Section 70a, 11 U. S. C. A. #110(a), the trustee acquires the title of the bankrupt to all of his property and possessions at the date the petition is filed, subject to valid claims, liens and equities enforceable against the bankrupt. Under Section 47a, as amended, 11 U. S. C. A. #75(a), in determining conflict of title between the trustee and third parties, his rights are to be determined as if he were a creditor holding a lien by legal or equitable proceedings at the time the petition was filed. *The trustee represents the general creditors and in this capacity may assert claims, avoid preferences and collect assets where the bankrupt, if bankruptcy had not intervened, would be estopped. In re Kessler, 2 Cir., 186 F. 127; Merchants’ Nat. Bank v. Sexton, 228 U. S. 634, 645, 33 S. Ct. 725, 57 L. Ed. 998.*” (Emphasis supplied.)

IV.

The Dismissal of Chapter XI Proceedings and Subsequent Adjudication of the Debtor as a Bankrupt Vests the Trustee in Bankruptcy With All of the Title and Rights of the Debtor in Proceedings Then Pending on Review.

Appellant in effect contends that the petition for review of the referee's order allowing Appellant's claim *expired with the adjudication of the debtor as a bankrupt*, and that the review initiated by the debtor could not thereafter be prosecuted by the debtor's trustee in bankruptcy. It is true, as Appellant states, that the referee refused permission to the *receiver* to petition for review from the referee's order allowing Appellant's claim. By such action the referee acted as his own appellate court. No review or appeal was taken from that particular order because its effect was not disastrous, the debtor as such having initiated the review. The receiver was permitted by the District Court to appear *amicus curiae*, as it was essential that the receiver, as the representative of the creditors, be permitted to be heard with respect to the allowance of the claim. Thereafter, and during the pendency of such review proceedings before the District Court, the debtor was adjudicated a bankrupt. Unfortunately the transcript designated by Appellant fails to cover these material proceedings. From the moment of adjudication, the debtor legally ceased to exist, and in his place and stead stood the trustee in bankruptcy of the bankrupt with all of the title of the bankrupt (previously debtor) as provided by *Section 70a of the Bankruptcy Act*. To now hold that the trustee could not carry on with the review proceedings would have the effect of ignoring succession of title under *Section 70a*, and would

be equivalent to abandoning the interests of creditors in the controversy pending on review.

If Appellant's position had any merit at all, the most that could be said for it would be, that, upon termination of the Chapter XI proceedings, and the advent of bankruptcy, the entire proceedings could have been begun anew with the filing of new objections by the trustee. This would have involved the unnecessary expense and inconvenience of retrying issues that had already been tried, and would have meant that the many days spent in the trial of this case would have been wasted. Results such as these are obnoxious to the objectives of bankruptcy and equity which aim at celerity, economy and conclusiveness.

Remington on Bankruptcy (5th Ed.), Vol. 1, Sec. 27, p. 57.

A comparable situation arose in the case of *Canton Wire and Steel Co.*, 197 Fed. 767, wherein creditors had conducted litigation in their own name, establishing that a certain claim should be disallowed. The District Court, upon review, held that because a trustee in bankruptcy was subsequently appointed, the court should not ignore all that had gone before and compel the trustee to proceed anew with the litigation.

Where a claim is objectionable, it is not even necessary that formal objections be filed to such claim. It has been held that a referee must *sua sponte* raise the objection to the claim when the defect is called to his attention.

In re Strotz (D. C., Cal.), 50 Fed. Supp. 322, 325;
Matter of Owl Drug Co. (C. C. A. 9), 84 F. 2d 342.

The cases cited by Appellant to the effect that a party expecting to benefit from a review taken by another cannot be substituted for the petitioner and permitted to prosecute the review when the latter has abandoned or wishes to abandon it, has no relevancy to the problem before this court. There has been no abandonment or desire to abandon the proceedings on review. Termination of the debtor proceedings and the adjudication of the debtor as a bankrupt had the effect of substituting the trustee in bankruptcy in the place and stead of the debtor for purposes of such review.

Conclusion.

It is of little consequence to a trustee in bankruptcy that one claimant properly becomes entitled to preference over other creditors of a bankruptcy estate. It is his vital concern, however, that no claimant be permitted unjust enrichment at the expense of other claimants. The bankruptcy court, and a trustee as its agent, must vigilantly guard against inequity in the distribution of the estate. To this end it is the trustee's duty to object to the allowance of an insufficiently proved or unmeritorious claim, and to use every effort to avoid unjust enrichment to such creditor even if the creditor be the State of California or the United States of America.

In this case the trustee in bankruptcy succeeded to the prosecution of claim objections filed by the receiver of the debtor and the debtor in a Chapter XI proceeding. He here seeks the affirmance of the District Court's decision which disallowed a jeopardy or arbitrary assessment of motor vehicle fuel taxes because of the lack of evidentiary support to such claim, to-wit: that the bankrupt had distributed gasoline upon which the vehicle fuel

tax had not previously been paid by the refiner of such gasoline.

This is effectually a proceeding between one creditor and the representative of all other creditors. While conceivably as between the taxpayer and the taxing authority, the failure of the taxpayer to satisfactorily explain discrepancies in his books might serve to subject him to a tax which he doesn't lawfully owe, it would be abhorrent to equitable conscience that in a bankruptcy proceeding the taxing authority thus be unjustly enriched at the expense of other creditors, particularly where the trustee is not possessed of the "knowledge" of the bankrupt taxpayer as to the transactions involved. In this case, not only did the State not prove that the tax had been incurred, but the evidence shows that it is inherently improbable that any gasoline was sold upon which the refiner had not already paid the tax. The State would have us resort to the conjecture that this gasoline came from one of four principal sources where such tax unpaid gasoline might have been available. We respectfully submit that the District Court properly refused to sustain the claim on mere conjecture and surmise.

Respectfully submitted,

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DECHTER, HOYT, PINES & WALSH,
Attorneys for Appellee.

No. 12782

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

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vs.
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Appellee.

APPELLANT'S REPLY BRIEF.

I.

Preliminary Statement.

The first eight pages of "appellee's" brief, consisting for the most part of an attempt to discredit the manner in which appellant has presented his position in Appellant's Opening Brief, would appear to indicate that the trustee in bankruptcy of the Estate of Arlie R. Lockwood is aware of the precariousness of his position insofar as the real issues raised by the appeal herein are concerned. It may be that counsel for the trustee in bankruptcy are seeking to divert attention from the fact that they are not counsel for Arlie R. Lockwood, the appellee herein, although they designate themselves as "Attorneys for Appellee" at the conclusion of "appellee's" brief. [The Court's attention, in this connection, is directed to the District Judge's Findings of Fact, Conclusions of Law and Judgment, Tr. 80-85.]

A. "APPELLEE'S" JURISDICTIONAL STATEMENT.

We note on page 1 of the brief* filed by counsel for E. A. Lynch, Trustee in Bankruptcy of the Estate of Arlie R. Lockwood, Bankrupt, that it is intimated that Appellant's Opening Brief fails to disclose that the Chapter XI proceedings involving Mr. Lockwood terminated, that Mr. Lockwood was thereafter adjudicated a bankrupt, and that Mr. Lynch thereafter qualified as trustee in bankruptcy of Mr. Lockwood's estate. Reference to Appellant's Opening Brief, page 5, will dispose of this point. The Court's attention is also directed to pages 63-85, inclusive, of the transcript wherein the termination of Chapter XI proceedings, the adjudication of Mr. Lockwood and the qualification of Mr. Lynch as trustee in bankruptcy of Mr. Lockwood's estate, are clearly established.

Counsel for Mr. Lynch are entirely correct when they state on page 2 of appellee's brief that the very title of this case on appeal "fails to reveal that E. A. Lynch as trustee in bankruptcy of Arlie R. Lockwood, Bankrupt, is the appellee herein." As appellant has pointed out in his opening brief, Mr. Lynch, as trustee in bankruptcy of the estate of Arlie R. Lockwood, was improperly permitted to prosecute the petition for review filed by Mr. Lockwood. If Mr. Lockwood and appellant herein were the only parties to the review pending before the District Judge, it would appear, accordingly, that these two parties could

*For the sake of simplicity, said brief will be referred to hereafter as "appellee's" brief, without quotation marks, although it is appellant's position that neither E. A. Lynch as trustee in bankruptcy of the Estate of Arlie R. Lockwood, nor the trustee's attorneys could properly prosecute Mr. Lockwood's petition for review after it was abandoned by Mr. Lockwood, no petition for review having been filed by Mr. Lynch while he was acting as receiver in the Chapter XI proceedings which preceded Mr. Lockwood's adjudication.

only be the proper parties on appeal. However, inasmuch as Mr. Lynch was permitted to prosecute Mr. Lockwood's petition for review in the District Court, his attorneys were necessarily served as counsel for an appellee usually would be from that point on. Neither Mr. Lockwood nor counsel in his behalf made any appearance before the District Judge below subsequent to the abandonment by Mr. Lockwood of his petition for review. The only order authorizing Mr. Lynch or his attorneys to appear in the District Court in connection with Mr. Lockwood's petition for review was the Order of the Honorable Benjamin Harrison permitting Harry A. Pines, Esq., of Dechter, Hoyt, Pines and Walsh, attorneys for Mr. Lynch as receiver in the then Chapter XI proceedings relating to Mr. Lockwood, to appear as *amicus curiae* in connection with Mr. Lockwood's petition for review. [Tr. 62, 68, 69.] To our knowledge, Mr. Pines has not requested leave of this Court to appear as *amicus curiae* in connection with the within appeal.

We note also that counsel for the trustee in bankruptcy of Mr. Lockwood's estate claim on page 2 of appellee's brief to be uncertain whether the "Comptroller" referred to in the undertaking for costs on appeal filed by appellant is the "Controller", the appellant herein. We believe that the inadvertent spelling employed by the bonding company is immaterial, and certainly not misleading, in view of the language of the undertaking for costs and the fact that there is a "Controller" of the State of California, and no official having the designation "Comptroller."

B. SPECIFICATION OF ERRORS.

Commencing at page 3 of appellee's brief, counsel for the trustee in bankruptcy of Mr. Lockwood's estate seek to persuade this Court that appellant has "chosen to ignore Rule 20(d) of the Rules of this court" and that Appellant's Opening Brief fails to separately and particularly set forth the errors relied upon by appellant. The invalidity of this contention is best demonstrated by reference to Appellant's Opening Brief, where, commencing at page 36, the three errors urged are set forth and numbered consecutively. The errors urged are, to recapitulate:

1. "The Findings Made by the Referee Are Amply Supported by the Record and Should Not Be Disturbed." (App. Op. Br. 36.)

2. "The Record Herein Clearly Establishes the Tax Liability Upon Which Appellant's Proof of Claim Is Predicated." (App. Op. Br. 43.)

3. "Mr. Lockwood Having Filed the Only Petition for Review of the Referee's Order Allowing Appellant's Claim in Full, and Lockwood Having Abandoned Said Petition, the District Court Erred in Permitting Others to Review the Referee's Order and Others Should Not Be Permitted to Prosecute This Appeal." (App. Op. Br. 47.)

It is apparently the contention of counsel for Mr. Lynch, trustee in bankruptcy of Mr. Lockwood's estate, that appellant's brief is defective because the three points urged, as aforesaid, were not repeated separate and apart from appellant's argument and specifically designated as specifications of error. And this contention is made despite the fact that the three points urged by appellant are simply and clearly set forth in the Topical Index to Appellant's Opening Brief.

As the cases cited by counsel for the trustee in bankruptcy of Mr. Lockwood's estate on pages 3 and 4 of their brief all reiterate, an appellant is under a duty, in his opening brief, to set forth clearly the errors he urges not only to make his position clear to the Court but also to enable opposing counsel to file an adequate brief by way of answer. Referring again to Appellant's Opening Brief, as well as to the transcript herein, it is clear that the Order from which this appeal is being taken is predicated solely upon the District Judge's holding that the only question presented by Mr. Lockwood's petition for review was whether the evidence supports the referee's findings and the District Judge's further holding that the record does not sustain the referee's finding "that Arlie R. Lockwood, doing business as Dependable Oil Co., distributed said amounts of motor vehicle fuel with respect to which 3-cents per gallon tax had not been paid to the State of California." [Tr. 79-81; App. Op. Br. 6, 7.] We are unable to comprehend, in light of the foregoing and in light of the cases cited on pages 3 and 4 of appellee's brief how it may validly be contended that the errors urged by appellant are not numbered and set out separately and particularly, in Appellant's Opening Brief.

C. STATEMENT OF THE CASE.

Continuing in the attempt to discredit the organization rather than the substance of Appellant's Opening Brief, it is contended at the close of page 4 of appellee's brief that Appellant's Opening Brief does not contain a "Statement of the Case" in compliance with Rule 20(c) of this Court. Appellee's brief refers broadly to pages 7-23, inclusive, of Appellant's Opening Brief and ignores entirely the first full paragraph on page 6 of Appellant's Opening Brief, the first full paragraph on page 7 of Appellant's Opening

Brief, as well as sub-titles (a) and (b) under the last mentioned paragraph and the three separately numbered headings under appellee's argument commencing at page 36 of Appellant's Opening Brief, all of which are tied together by the Topical Index to Appellant's Opening Brief. Appellant can again only suggest that counsel's extended criticism of the organization of Appellant's Opening Brief, which represents the best effort of appellant's counsel to simply and clearly delineate the issues raised in light of the factual situation involved, can be predicated only upon a desire to avoid meeting the issues clearly raised by Appellant's Opening Brief in appellant's humble opinion, and to avoid a consideration of the merits of appellant's position.

D. QUESTIONS ON APPEAL.

Although Appellant's Opening Brief, as we have pointed out above, presents three clearly designated points for consideration, counsel for the trustee in bankruptcy of Mr. Lockwood's estate seeks to evade a consideration of those points by setting forth in pages 5 and 6 of appellee's brief certain questions which counsel for the trustee in bankruptcy intimate are sought to be raised by appellant herein.

We respectfully reiterate, as set forth in Appellant's Opening Brief, that the questions presented on this appeal are:

1. Whether the District Judge properly upset the referee's findings which are amply supported by the record;
2. Whether the record establishes the tax liability upon which appellant's proof of claim is predicated;

3. Whether others than Mr. Lockwood were properly permitted to prosecute the petition filed by Mr. Lockwood, and whether others than Mr. Lockwood should be permitted to prosecute this appeal.

As we have stated above and in our Opening Brief [see the District Judge's Memorandum on Review—Tr. 73-80—particularly the next to the last paragraph thereof, commencing at the close of page 79 of the transcript; App. Op. Br. 6, 7] the District Judge predicated his reversal of the referee's order solely upon the conclusion that the evidence adduced before the referee does not support the referee's findings. It is submitted that a reading of Appellant's Opening Brief will clearly disclose that appellant is contending primarily that there was a valid tax liability on the part of Mr. Lockwood; that the evidence adduced before the referee amply supports the referee's findings; and, incidentally, that parties other than Mr. Lockwood, the sole petitioner for review, were permitted to prosecute that petition after Mr. Lockwood had abandoned it.

E. PERTINENT PROVISIONS OF THE CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX LAW.

Continuing with the attempt to obscure the true issues raised in this appeal, appellee's brief at pages 7 and 8 takes exception to the manner in which Appellant's Opening Brief seeks to convey to the Court a general picture of the California Motor Vehicle Fuel License Tax Law.

Appellee's brief directs the Court's attention to the fact that Section 7351 of the Motor Vehicle Fuel License Tax

Law, California Revenue and Taxation Code, was amended in 1947, the amendment being effective July 1, 1947. The amendment is of no materiality insofar as this appeal is concerned inasmuch as the section as reproduced in Appellant's Opening Brief clearly discloses the rate of tax in effect during the period involved herein. Similarly, the inclusion of subdivision (e) in appellant's reproduction of Section 7305 of the California Motor Vehicle Fuel License Tax Law in no way impinges upon a consideration of the issues involved herein. We are unable to perceive that the substitution of the word "determination" for the word "assessment" in Section 7353 of the California Motor Vehicle Fuel License Tax Law is material to a consideration of the issues involved in this appeal inasmuch as these words are synonymous and are used interchangeably insofar as the California taxing structure as a whole is concerned.

Although we believe that the portion of Appellant's Opening Brief devoted to the exposition of the pertinent provisions of the California Motor Vehicle Fuel License Tax Law has not misled counsel and will certainly not mislead this Court but will serve only to assist the Court in obtaining an over-all view of the taxing statute involved, we have felt it necessary to refer to this portion of appellee's brief as it infers the possibility of intentional misrepresentation on the part of appellant's counsel, and, worse yet, seeks to becloud the basic issues clearly presented by appellant in his Opening Brief.

II.

Reply to the Portion of Appellee's Brief Entitled
"Argument."

Pages 9 to 12, inclusive, of appellee's brief purport to demonstrate that the referee's findings are not supported by the record; that the findings were, accordingly, properly set aside by the District Court. A careful analysis of this portion of appellee's brief discloses no answer to the analysis of testimony and evidence contained in Appellant's Opening Brief, pages 8 to 23, inclusive. We are unable to perceive how it may validly be contended, as appellee's brief apparently attempts to contend, that the record below contains only uncontradicted evidence that the taxable distributions upon which appellant's proof of claim was predicated did not take place. It would appear that appellant could much more plausibly contend that the record below discloses without more than ephemeral contradiction that the taxable distributions in question did occur.

Commencing at page 13 of appellee's brief, counsel for the trustee in bankruptcy of Mr. Lockwood's estate, contend that the District Court was not bound by the referee's Conclusions of Law nor by his unsupported Findings of Fact. We are entirely in accord with that contention. The fundamental question raised by appellant in this appeal (see App. Op. Br.) is that the District Court was bound by the referee's Findings of Fact which are supported by the record. As we have pointed out in the preceding paragraph, we are unable to perceive how it may be validly contended that there was no conflict in the testimony and evidence adduced before the referee.

Commencing at page 14 of appellee's brief, we find a discussion relating to the burden of proof in hearings upon objections to tax lien claims in bankruptcy. We are un-

able to perceive the materiality of this discussion inasmuch as appellant abided by the referee's ruling that appellant had the burden of going forward, not only the burden of proof. As reference to Appellant's Opening Brief will disclose, appellant raises no issue here regarding the propriety of the referee's ruling.

The closing portion of the argument contained in appellee's brief seeks to establish the right of Mr. Lynch, both as Receiver under Chapter XI and thereafter as trustee in bankruptcy of Mr. Lockwood's estate, to prosecute the petition for review filed by Mr. Lockwood while Mr. Lynch was receiver under Chapter XI for Mr. Lockwood's estate. Counsel for Mr. Lynch seek to brush aside the fact that where an adjudication terminates pending Chapter XI proceedings, the adjudication relates back to the date the Chapter XI petition was filed. Also ignored is the fact that Mr. Lynch, as receiver, took over all the assets possessed by Mr. Lockwood when the Chapter XI petition was filed. This is not a situation involving a cause of action possessed by a bankrupt prior to the commencement of bankruptcy proceedings. To the contrary, we are concerned here with a review taken in connection with an order made by a referee in bankruptcy during the pendency of Chapter XI proceedings, the debtor and the receiver being parties to that order. Although it does not appear necessary at this point to discuss at length the application of the principles of *res judicata* and the confusion which would result if it were held by this Court that in every instance where a Chapter XI proceeding is followed by an adjudication the

trustee in bankruptcy may prosecute a petition for review to which the receiver was not a party.

It should be noted in passing, as we have pointed out in the preliminary portion of this brief, that the District Court permitted counsel for the receiver to appear as *amicus curiae* in connection with Mr. Lockwood's petition for review and not the receiver.

Although Section 70(a) of the Bankruptcy Act, 11 U. S. C., Section 110, is referred to in appellee's brief, it should be noted that subdivision (a) of that section specifically provides that "The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt *as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this Act.*"

Conclusion.

It is to be regretted that appellee's brief seeks to avoid the basic issues presented by appellant by attempting to plead inability of counsel to perceive the matters clearly set forth in Appellant's Opening Brief. At any rate counsel for the trustee in bankruptcy of Mr. Lockwood's estate have attempted in their argument to demonstrate that the Findings of the referee are not supported by the record and at least issue has been joined with respect to the primary question involved. Insofar as this issue is concerned, it is again submitted that a perusal of the entire record herein can lead only to one conclusion, namely, that

the Findings of the referee are amply supported by the record and should not have been disturbed by the District Judge. The propriety of the District Court's action in permitting others than a petitioner for review to prosecute a petition after abandonment by the petitioner is a matter of concern to this Court in its supervision of the operation of the Bankruptcy Courts in this circuit. Issue on this point has likewise been joined, as the general discussion contained under Point IV of appellee's brief demonstrates.

It is submitted that the Order of the District Judge should be reversed and the Findings and Order of the referee reinstated.

Respectfully submitted,

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Attorney General,

JAMES E. SABINE,

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No. 12782

IN THE

United States Court of Appeals

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Appellant,

vs.

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PETITION FOR REHEARING.

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Appellant,

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Appellee.

PETITION FOR REHEARING.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The undersigned, your petitioner, respectfully submits that he has been aggrieved by an Opinion of Your Honors rendered herein on the 28th day of November, 1951, in the respects hereinafter set forth, and urgently prays for a rehearing of said matter on the following grounds:

I.

The Opinion places in jeopardy all claims of California State taxing agencies presently pending in bankruptcy proceedings in the Federal bankruptcy courts in this State, inasmuch as the form of the proof of claim involved in the instant appeal and the language contained therein have been employed by all State taxing agencies for a period of in excess of five years and are presently to be found in all pending claims.

II.

Reference to the amended proof of claim involved in the instant appeal [Tr. 26-32] will disclose that the vital facts to support the proof of claim, namely, the levy of tax assessments, their non-payment and the existence of a tax lien under State law have been positively asserted under oath as required by Section 57(a) of the Bankruptcy Act (11 U. S. C. 93] and not upon "information and belief" as the Opinion filed November 28, 1951, would appear to indicate.

Although it is positively asserted in line 6 at page 3 of the printed Opinion that "here the oath is upon information and belief," reference to the first paragraph of the amended proof of claim [Tr. 26] will disclose that it reads as follows: "On the sixteenth day of October, 1946, came Ewing Haas, and made oath and said that he is a Deputy Controller of the State of California and as such is qualified and empowered to make this claim on behalf of the State of California;" . . .

Following the preceding quoted first paragraph, there appear a series of paragraphs, set off by semicolons, each paragraph commencing with "That." The words "informed and believes" appear only in the first paragraph commencing with "That" and in no way modify the succeeding positive averments.

Although we are necessarily required to go outside the record to explain to the Honorable Court why the words "informed and believes" appear not only in the second paragraph of the instant proof of claim but in the equivalent paragraph of all State tax claims, in view of the serious nature of the conclusion reached by the Court in the instant appeal regarding the character of State tax claims, we are compelled to direct the Court's attention

to the fact that the words "informed and believes" are employed solely by virtue of the fact that a proof of claim executed on behalf of any State agency must of necessity be executed by an executive officer who derives his information from official State records. Although we are aware that claims filed by the Collector of Internal Revenue do not contain the words "informed and believes" as used in the proofs of claim filed by California taxing agencies, this Court can take judicial notice of the fact that the Collectors in San Francisco and Los Angeles necessarily execute their proofs of claim solely in reliance upon their official records as is the case with the State taxing officials.

Subsequent to the filing of the Court's Opinion in this matter on November 28, counsel for appellant herein, in appearing on behalf of the California State Board of Equalization at a hearing had upon objections filed by a trustee in bankruptcy to a claim for taxes due under the California Sales and Use Tax Law, was faced with meeting the argument that the Board's claim was not *prima facie* valid by virtue of the presence of the words "informed and believes" and this Court's Opinion of November 28, 1951. Counsel for the Board of Equalization requested and was granted leave to file an amended proof of claim eliminating the words "informed and believes," but the fact remains, regardless of the language employed in proofs of claim hereafter filed, that executive officers of State taxing agencies are in the same position as Collectors of Internal Revenue with respect to their personal knowledge of the status of thousands upon thousands of taxpayer accounts. It is of grave importance to all California State taxing agencies that a petition for rehearing be granted for the purpose of obtaining a full and de-

tailed consideration of the effect of the presence of the word "informed and believes" in proofs of claim filed by California taxing agencies inasmuch as it would appear under the decision in *In re United Wireless Telegraph Co.*, 201 Fed. 445, that the verification of the claim involved in the instant appeal was *not* made upon information and belief.

III.

It is a well established principle that tax determinations levied by Federal and State taxing officials are presumed to be correct.

Schwartz v. United States, 70 Fed. Supp. 437 (D. C. Cal.);

Shea v. Commissioner, etc. (9th Cir.), 81 F. 2d 937;

Gordon v. Commissioner, etc. (9th Cir.), 75 F. 2d 429;

Wehe v. McLaughlin (9th Cir.), 30 F. 2d 217.

See also:

People v. Mahoney, 13 Cal. 2d 729;

People v. Schwartz, 31 Cal. 2d 59;

California Code of Civ. Proc., Sec. 1963, subd. 15.

The Opinion filed November 28, 1951, gives no effect to the presumption of correctness attaching to Federal and State tax assessments and it would appear that objection might validly be made to claims filed by Collectors of Internal Revenue, as objection was made here, by subpoenaing the Collectors and adducing testimony from them to

the effect that they relied solely upon their official records in executing proofs of claim for Federal tax liabilities. It is respectfully submitted that a rehearing should be granted to preclude a possible serious attack upon the allowance of all Federal and State tax claims in bankruptcy proceedings predicated upon the inherent character of Federal and State taxing agencies and the vulnerability of Federal and State tax claims if the presumption of correctness attaching to Federal and State tax assessments is disregarded.

IV.

It is stated in the Opinion at page 3, in the first paragraph, that when the Referee in Bankruptcy required appellant-claimant to go forward with his proof he did so “realizing no doubt that since the verification of the claim was upon the affiant’s information and belief, the claim lacked the evidentiary weight of presumptive validity.”

Present counsel for appellant feel obligated to former counsel who represented appellant at the hearing before the Referee, and who is presently a judge of the Superior Court in the County of Los Angeles, to direct the Court’s attention to the erroneous nature of its conclusion. Reference to pages 94 to 101 of the transcript will disclose that former counsel for appellant *did* take the position that appellant’s claim was *prima facie* valid and that he proceeded to go forward as the Referee required him to do without receding from that position. Although what occurred during the short recess referred to at page 97 of the transcript is not a part of the record in this case, this Court’s atten-

tion is respectfully directed to the fact that former counsel complied with the Referee's ruling purely to protect appellant's position in view of the large sum of money involved. Inasmuch as the Opinion as it now reads might be construed as perhaps unfairly reflecting on former counsel, we respectfully offer to submit an affidavit of former counsel for the Court's consideration, and in any event respectfully request the Court to reconsider the conclusion reached in this respect.

V.

Present counsel also find themselves in somewhat of a dilemma regarding their own position in the instant appeal. It is stated at page 3 of the Opinion filed November 28, 1951, that appellant "in its brief expressly disclaims any attack on . . . [the referee's] ruling . . ." regarding the *prima facie* validity of appellant's tax claim. Actually, the problem presented appears to be a semantic one inasmuch as Edward Sumner, Esquire, who personally drafted appellant's briefs in the instant matter, is prepared to state under oath that he did not in any manner or form intend by any language used to infer that appellant did not positively assert and rely upon the *prima facie* validity of its tax claim. It would indeed be unfortunate if the choice of language used by counsel for a party were to prejudice his client's case, solely because of a semantic difficulty. (See App. Op. Br. pp. 8, 43-46.)

It is respectfully requested that a petition for rehearing be granted and that the Opinion filed November 28, 1951, be reconsidered in this respect.

VI.

In considering the evidence adduced before the Referee, it is stated in the second paragraph of page 3 of the Opinion filed November 28, 1951, that appellant's case "rested solely upon . . . [the] difference between purchases and sales and the inability or refusal of the bankrupt to produce evidence that the tax was or had been paid on the excess."

The foregoing quoted statement does not fully set forth appellant's position. As we have previously pointed out to this Court, the California Motor Vehicle Fuel License Tax Law (California Revenue and Taxation Code, Div. 2, Part 2) imposes upon "distributors" a tax for the privilege of "distributing" motor vehicle fuel in this State. "Distribution" is defined as including "the sale" of motor vehicle fuel in this State and a "distributor" is defined as including every person who within the meaning of the term "distribution" distributes in this State motor vehicle fuel of which there has been no prior taxable distribution, or who receives in this State motor vehicle fuel of which there has been no prior taxable distribution. Section 7354 of the Law provides that there shall be only one taxable distribution and all brokers and distributors are required to keep accurate records from which the State agency can account for all taxable distributions in the entire State. (See, also, Sections 8301 to 8307.) In other words, the statute is so designed that the State agency can at any time, through the records required to be kept by law, check the distribution of all motor vehicle fuel.

When the investigators for the State agency testified that they had been unable to ascertain the precise sources from which Lockwood had derived the gallonage in question, they were testifying that Lockwood had not obtained

the gallonage from a licensed distributor, or, to put it differently, from a tax-paid source. We respectfully submit that the failure of the investigators to ascertain the illicit source from which Lockwood derived the gallonage in question should not be permitted to prejudice appellant's position since even if the source had been discovered it could obviously not have been a tax paid source.

We respectfully submit that there is indeed a factual basis for the Referee's conclusion and that the Referee's conclusion was not predicated merely upon suspicion and surmise. It is to be noted that Lockwood did purport to explain away the gallonage in question by stating that the State's auditors had duplicated certain items. It is to be noted that this explanation (see App. Op. Br. p. 22, *et seq.*) was spurious. It is also to be noted that when given the opportunity to do so Mr. Lockwood was unable to specify any legitimate source from which the gallonage in question had been obtained but resorted solely to the monosyllabic denial that he had ever purchased motor vehicle fuel from other than a licensed distributor, and to a monosyllabic affirmance that all the gasoline purchased by him during the periods in question were tax paid, despite the fact that the records examined by and available to the State agencies reflected all taxable distributions in the State of California but did not disclose a taxable distribution to Mr. Lockwood or to any source from which Mr. Lockwood might have derived the gallonage upon which appellant's claim is predicated.

We agree entirely with the views expressed by this Court that a Referee should not be governed merely by suspicion, but in this instance can it be said that the Referee was guided merely by suspicion when the testimony adduced before him established that a check of all

legitimate sources failed to disclose a prior taxable distribution of the gallonage in question to Lockwood and that Lockwood himself could not point to a legitimate source?

It is respectfully submitted that a petition for rehearing should be granted and this aspect of the Opinion reconsidered in light of such decisions as *Cohen v. Commissioner*, 176 F. 2d 394, and *Greenfield v. Commissioner*, 165 F. 2d 318, which stand for the propositions that the silence of a taxpayer who should know most about the matter involved is entitled to great weight and that an incredible explanation may properly be rejected.

VII.

The concluding paragraph of the Opinion filed November 28, 1951, states that there is no merit to appellant's argument "that the trustee was not competent to prosecute the review." It is stated in the concluding sentence of that paragraph that after bankruptcy "the trustee stood in the place of the bankrupt and could avail himself of defenses as fully as the bankrupt." We should, however, in this connection, like to direct the Court's attention to the decisions in *In re Pramer*, 131 F. 2d 733, and *In re Sawilowsky*, 284 Fed. 975 (affirmed 288 Fed. 533), which stand for the proposition that a bankrupt has no standing in ordinary bankruptcy proceedings to petition for review of orders allowing claims. If Lockwood himself, after adjudication, had no standing to petition for review, it is respectfully submitted that the trustee standing in the place of the bankrupt was in no better position.

Wherefore, petitioner respectfully and urgently prays that a rehearing be granted and that the mandate of this Court be stayed pending the disposition of this petition.

Respectfully submitted,

CONTROLLER OF THE STATE OF CALIFORNIA,

By EDMUND G. BROWN,

Attorney General,

JAMES E. SABINE,

Deputy Attorney General,

EDWARD SUMNER,

Deputy Attorney General,

Attorneys for Appellant.

Certification.

I, EDWARD SUMNER, Deputy Attorney General of the State of California, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing Petition for Rehearing in the case of Controller of the State of California, Appellant, v. Arlie R. Lockwood, Bankrupt, Appellee, is well founded and that it is not presented for the purpose of creating a delay.

EDWARD SUMNER.

No. 12783

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IGNACIO VALENCIA MARTINEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Statement of the Case.

Counsel for the appellant herein has very accurately and fairly summarized the pertinent testimony in this action now on appeal. There was obviously a question of credibility and this was passed upon by the Trial Court, sitting without a jury, in favor of the prosecution. In other words, the Court believed the statement of the witness Rual Bell, a narcotics officer. The conflict in testimony came only in connection with the purported conversations between Bell and the defendant Martinez.

It is the appellee's position that if the statements of Rual Bell are taken as true, as they were by the Trial Court, there is absolutely no question of entrapment for the reason that Martinez made the initial overtures toward the

sale of narcotics by asking Bell, before any other conversation on the subject, if he was there to "pick up." It is agreed that to "pick up" means to buy narcotics.

If credibility is to be given to the statements of Martinez, as the Trial Court obviously did not, his testimony taken as a whole would indicate that Martinez required very little persuasion and was able to go around the corner and return immediately [Tr. pp. 74, 75] and make a delivery of narcotics and accept payment therefor without even stating a price. This should indicate Martinez' criminal inclinations, in the absence of any other proof, as it showed he knew the trade, had a source of supply immediately available, and understood and accepted the going price in the trade.

The appellee will rely on *Sorrells v. United States*, 287 U. S. 435 (1932), which is apparently the leading case. The only question will be the applicability of the law to the facts.

ARGUMENT.

The Evidence Is Sufficient to Sustain the Judgment of Conviction, There Being No Proof of Entrapment.

The defense of entrapment was first definitely recognized in the United States Supreme Court in the case of *Sorrells v. United States*, 287 U. S. 435, and the rule of that case has been widely followed by the lower courts, including this Court of Appeals in *Stein v. United States*, 166 F. 2d 851 (1948), and *Louie Hung v. United States*, 111 F. 2d 325. The doctrine of entrapment has only a limited application, however, and is applied only where the record shows that a defendant, otherwise innocent and having no previous disposition to commit a crime, is lured into committing a crime, against his will, by the inducement and urging of a decoy set up by the law-enforcement authorities.

The rule of the *Sorrells* case is well summarized at page 441 of the Supreme Court opinion, as follows:

“It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions.

“It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Grimm v. United States*, 156 U. S. 604, 610; *Goode v. United States*, 159 U. S. 663, 669; *Rosen v. United States*, 161 U. S. 29, 42; *Andrews v. United States*, 162 U. S. 420, 423; *Price v. United States*, 165 U. S. 311, 315; *Bates v. United States*, 10 Fed. 92, 94, note p. 97; *United States v. Reisenweber*, 288 Fed. 520, 526; *Aultman v. United States*, 289 Fed. 251. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.”

Some recent cases following the *Sorrells* decision include the following:

United States v. Cerone, 150 F. 2d 382, 384, 7 Cir. 1945;

United States v. Brandenburg, 162 F. 2d 980, 982. 3 Cir. 1947 (wherein a long line of cases following the *Sorrells* decision is cited);

Ryles v. United States, 172 F. 2d 72, and 183 F. 2d 944, 10 Cir. 1948-1950 (where the inducement was similar to that in the present case except that the defendant was a known addict and addicts were used as decoys. Court held that there was no entrapment);

United States v. Roett, 172 F. 2d 379, 3 Cir. 1949.

There is a great difference in the facts between that case and the present one. Sorrells was affirmatively shown as having had a good reputation in the community and to have given way to persuasion only after an evening of reminiscences with a friend and the decoy, a man who had served in the same division in the army overseas. When defendant finally agreed to secure the liquor, he left his home and was absent nearly half an hour before returning with the same.

In contrast, if we take the appellant's own testimony in the present case, the alleged conversation to induce the appellant to obtain narcotics took only a few minutes and it took the appellant only long enough to go around the corner and return to produce the desired type and quantity. This time around the corner is set at only *two* minutes by Agent Bell and two other witnesses. Unlike the *Sorrells* case, there was no taking advantage of the friendship or comradery with the defendant and the very brief *alleged* references to "sick bitches" would hardly be such as to induce an innocent person to commit a crime.

If we look to the testimony of Agent Bell, which the Court accepted by its decision, Bell merely asked for Tony the Greek and then Martinez, the appellant, asked him if he was there to "pick up." [Tr. p. 27, line 5.] This was the first reference to narcotics. When the Agent replied "yes," Martinez informed him that the neighbor-

hood was too "hot" that day. [Tr. p. 27, line 18.] When the Agent set a time the next day to "pick up," Martinez said that would be all right. [Tr. p. 27, line 23, to p. 28, line 4.] The next day when he returned, the only question was "how much"? Martinez disappeared for about *two* minutes [Tr. p. 29, line 5] and returned with the narcotics and accepted payment without mention of price [Tr. p. 29, lines 9, 10]. Thus there was absolutely nothing from this testimony to indicate that the appellant was induced to commit a crime that he was not already committing or prepared to commit.

As we look at the evidence as a whole, it appears that the government agent merely gave Martinez the opportunity to violate the law. Judge Learned Hand approved this procedure in following the *Sorrells* decision in the case of *United States v. Becker*, 62 F. 2d 1007, 2 Cir. 1933, at page 1008, where he said:

"It has been uniformly held that when the accused is continuously engaged in the prescribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series."

While it is true that evidence was not introduced on the past activities of the appellant, he admitted association with those in the neighborhood who handled narcotics, admitted his knowledge of the trade [Tr. p. 74, line 4, *et seq.*], and furnished the narcotics within two minutes' time. The inference is certainly permissible that this was not his first venture in the trade.

The Court of Appeals of this Circuit has passed on this question in *Stein v. United States*, 9 Cir. 1948, 166 F. 2d 851, and stated the rule at page 853 as follows:

“At the trial of this case appellants relied heavily on the defense of entrapment and upon this appeal reiterate with equal fervor that the facts hereinbefore set out establish that they were entrapped and cite in support of such contention the case of *Sorrells v. United States*, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249, which holds that where a government agent instigates and induces the commission of a criminal act by a person otherwise innocent of any criminal intent and without previous disposition to commit the criminal act, the defense of entrapment is available. However, as appears here, where the government agents merely employ stratagem for the purpose of apprehending persons already engaged in criminal activities no case of entrapment is made out. See also, *Louie Hung v. United States*, 9 Cir., 111 F. 2d 325. In the instant case the possession of opium and the formation of the intent and purpose to violate the law existed before the government agents became aware of the situation. The arrangements made between the government agents were designed only to apprehend appellants in the furtherance of their criminal enterprise.”

In *Ratigan v. United States*, 88 F. 2d 919, 9 Cir. 1937, we have the use of a decoy or stool pigeon. The language, at page 922, is pertinent:

“ . . . there is no entrapment in this case. The defendant was not led into a situation where he committed the act on motive or purpose of innocence on his part, or by the promise of ‘stool pigeons’ by display of purported authority that the defendant would

not be prosecuted, or upon such display of authority that the sale was no offense; all that was done by the stool pigeons was presenting themselves to the defendant soliciting the drug. There was no decoy solicitation, or conduct. What the defendant did was his free voluntary act. The 'stool pigeons' merely placed themselves in the way and afforded opportunity to purchase the drug."

In *United States v. Spadafora*, 181 F. 2d 957, 7 Cir. 1950, the Court said, at page 959:

"Where government agents merely offer the opportunity for the commission of a crime to one who already has the criminal intent, entrapment is not present. *United States v. Lindenfeld*, 2 Cir., 142 F. 2d 829."

In *Cratty v. United States*, 163 F. 2d 844, C. A. D. C. 1947, the Court cites that portion of the *Sorrells* decision heretofore quoted in this brief as the existing law. The facts in that case were very similar to this one in that the decoy conversationally asked for marijuana. Defendant denied having it in his possession and yet went away and came back with some.

These rules were well stated before the *Sorrells* case in *United States v. Pappagoda*, 288 Fed. 214 (D. C. Conn. 1923), a narcotic case where the agents furnished marked money, it was said at page 220:

"Thus it clearly appears that the defendant's position on this motion and plea are untenable, as matter of law as the stipulated facts do not bring the defendant within the ruling of the cases cited. If this prosecution was against Gaines, the situation would be different. The government agents did induce Gaines

to purchase narcotics, but there is nothing in the agreed statement of facts to show that they induced Pappagoda to commit any offense that he had not already committed or did not have the intention to commit, or was not fully able to commit. It would be a sad commentary on the law, if its officers were barred from receiving or soliciting such assistance as might be necessary to aid in detecting criminals while engaged in criminal pursuits. There are bounds beyond which no officer, in his zeal to make an arrest or secure a conviction, should go; but when the criminal intent originates in the mind of the accused; and the criminal offense is completed, the fact that an opportunity is furnished, or that the accused is aided in the commission of the crime, in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. To the argument that the act is done at the instigation or solicitation of an agent of the government, the answer is that the intent of the detective is not to solicit the commission of the offense, but to ascertain whether or not the defendant is engaged in an unlawful business.”

At pages 8 and 9 of the Appellant's Opening Brief, it is urged that the conversations between Bell and Martinez, as testified to by Bell, have a similarity to those in the *Sorrells* case. We submit that there is no similarity whatsoever because in the *Sorrells* case there was a persistent urging by the decoy, and a persistent refusal by the defendant, taking most of the evening, up until the time that the defendant finally succumbed to persuasion. In the present case, according to Bell there was no urging

whatever [Tr. p. 27, line 24, to p. 28, line 4] and according to Martinez himself, the so-called urging consisted of exactly two statements which might be construed as entreaties and the elapsed time was only a few minutes. Furthermore, these parties were strangers and there was no play upon friendship as in the *Sorrells* case.

The appellant further urges that when the defense of entrapment is injected into the case, the burden of proof shifts to the government to show that there was in fact no entrapment. (Op. Br. p. 10.) While the law is correct as stated where there is an applicable case, it doesn't apply here. In the first place, the first mention of entrapment in these proceedings was in the final argument of counsel for the defendant and was thrown in more or less as an afterthought. While the cross-examination of Bell and the examination of Martinez might have indicated that the defendant might argue that defense, the facts were so totally inapplicable to such a doctrine that it could hardly be said that the burden of proof would then shift to the prosecution to show that the defendant had a prior history of crime.

Conclusions.

The Trial Court was the trier of the facts and the judge of the demeanor and credibility of the witnesses. He obviously believed Agent Bell, the supporting testimony, and the statements of the defendant except for the claims of the defendant as to certain purported conversations. The background facts, shown by defendant's own admission

that after a short discussion he could go around the corner and immediately return with the desired narcotics, only served to corroborate the prosecution's witnesses.

The cases clearly hold that entrapment is a defense only to those without the prior inclination to commit a crime. A finding of absence of such a prior inclination in this case would be contrary to all of the facts in evidence and the inferences to be drawn therefrom. It is therefore respectfully submitted that the judgment heretofore rendered in this action should be affirmed.

Respectfully submitted,

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